No. 12189

United States

Court of Appeals

For the Ninth Circuit.

JACOB MORRIS DANZIGER,

Appellant,

vs.

ROBERT E. CLARK, United States Marshal, Southern District of California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12189

United States
Court of Appeals
For the Ninth Circuit.

JACOB MORRIS DANZIGER,

Appellant,

vs.

ROBERT E. CLARK, United States Marshal, Southern District of California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

A. BRIGHAM ROSE,
408 S. Spring St.,
Los Angeles 13, Calif.

For Appellee:

JAMES M. CARTER,
United States Attorney,

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,
600 U. S. Post Office & Court House Bldg.,
Los Angeles 12, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 7808-P H—Civil

In the Matter of:
The Petition of Jacob Morris Danziger,
For a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Peirson M. Hall, Judge of the United States District Court for the Southern District of California, Central Division:

The petition of Jacob Morris Danziger respectfully shows: that he is imprisoned and restrained of his liberty by Robert E. Clark, United States Marshal for the Southern District of California, in the City of Los Angeles, State of California, and that the said petitioner is so confined and restrained, according to the best of your petitioner's knowledge and belief, pursuant to a judgment and commitment filed the 10th day of February, 1945, which said judgment was invoked by the spreading of a mandate issued in the United States Circuit Court of Appeals for the Ninth Circuit, dated October 20, 1947, and spread upon the minutes of this court on the 1st day of December, 1947, all of which appears in the records and files of this court in case No. 15, 173-Crim., United States of America vs. Jacob Morris Danziger, et al., to which reference is hereby had.

Your petitioner further states that he is advised

by counsel A. Brigham Rose, Esq., whose offices are located at 408 South Spring Street, Los Angeles 13, California, and so believes, that the said imprisonment of petitioner herein is illegal, and that said illegality consists in this, to-wit: your petitioner, together with several individual defendants and two corporate defendants, was accused in an indictment filed December 30, 1941, of the alleged commission of the following offenses:

A. Counts I to VII, inclusive, charge separate violations of Section 17(a) (1), Securities Act of 1933, 15 United States Code, Section 77q(a) (1).

B. Counts VIII to X, inclusive, charge separate violations of Section 5(a) (2), Securities Act of 1933, 15 United States Code, Section 77(e) (2). (Defendants were acquitted as to these four counts.)

C. Counts XII to XVI, inclusive, charge separate violations of Section 215, Criminal Code, 18 United States Code, Sec. 388 (Using Mails to Promote Fraud).

D. Count XVII charges a violation of Title 18, United States Code, Section 88, in that defendants in the Central Division of the Southern District of California conspired to commit offenses against the United States by violating the aforesaid statute; and that pursuant to said conspiracy, committed certain specified overt acts at Los Angeles, California. Each of the several counts of the indictment allege that the offenses therein charged were committed in the Central Division of the Southern District of California.

The said indictment was returned, as hereinbefore stated, on December 30, 1941, but none of the defendants were arraigned until December 11, 1944, at which time your petitioner and one defendant, named Willard E. Warren (indicted as Warren C. Carter) were brought into court and required to plead. Your petitioner presented a motion to quash the indictment. The motion was denied and exception allowed. Thereupon, the court set the date of trial for January 16, 1945.

In the interim, to-wit: on or about the 24th day of December, 1944, your petitioner herein applied for an alternative writ of mandate or prohibition to the United States Circuit Court of Appeals for the Ninth Circuit, seeking to abate the proposed trial of your petitioner, which petition was denied without opinion on the morning of January 16, 1945.

The said cause came on for trial on the said 16th day of January, 1945, before the Honorable Claude C. McColloch, District Judge, who was then presented with a motion for a continuance, predicated on two grounds: First that petitioner was awaiting the action of the United States Circuit Court of Appeals on his petition aforementioned; and, secondly, of more importance to the petitioner, that by reason of the circumstances herein, he was unable to procure witnesses in his behalf and important documents.

The said trial judge frankly acknowledged the seriousness of the showing and interposed that the

solution under the circumstances was to go ahead and see what developed; that the apparent difficulties of the defendants in proceeding to trial could be handled if he were sitting in his own jurisdiction, to-wit: in Oregon, but, since the Honorable Paul J. McCormick, presiding judge in this district, had set the case for trial for January 16, 1945, the proceedings against petitioner would go ahead, subject to later developments. All proceedings against the previously arraigned defendant Willard E. Warren were thereupon dismissed, which action was followed by the entry of a plea in behalf of the two corporate defendants of not guilty, although they were not represented or in court, and your petitioner's counsel herein mentioned was, over his protest and objection, appointed to represent the said two corporate defendants, subject to developments as the proceedings unfolded.

Your petitioner respectfully submits that these unprecedented judicial acts forced him to proceed without a trial by jury for the manifest reason that such tentative and unusual proceedings could not possibly be had if a jury were impaneled. Your petitioner was thus denied his fundamental right to trial by jury. The trial thereupon proceeded as against your petitioner and the two corporate defendants only.

Your petitioner during the trial made a motion to quash the indictment upon the grounds that "the same was procured contrary to the laws of the United States and in violation of constitutional

provisos, namely, due process, the equal protection of the law, and the statutes in cases concerning the subject of requisite evidence and character of evidence that is essentially required in order to vote an indictment against an accused and put him to trial." Decision on this motion was reserved and subsequently denied, with exception allowed to your petitioner.

Your petitioner particularly calls this court's attention to the fact that the record during the trial shows that the indictment was procured on hearsay, and it should especially be kept in mind that it was subsequently established by the proceedings had in the case of Ballard vs. United States, 91 L. ed., 195, that the Grand Jury which indicted your petitioner, as hereinbefore alleged, was improperly impaneled. However, the Ballard decision had not been rendered up to the time of the judgment imposed upon your petitioner herein.

Your petitioner further submits that throughout the trial he was denied the equal protection of the laws or due process. The evidence presented before the trial judge was in no instance sufficient to meet the legal requirements according to all of the established decisions governing courts of this jurisdiction. Your petitioner intends to establish this contention to a point of demonstration upon the hearing had pursuant to this application.

Your petitioner further submits that the right secured to him under the sixth amendment to the Constitution of the United States, namely, that an

accused shall be tried in the district where the offenses were committed, was denied to him by reason of the fact that the proofs offered at the trial respecting the alleged conspiracy pertained, if they did to any conspiracy, to a conspiracy involving transactions in New York and Wilmington, Delaware.

Your petitioner further submits that he was deprived of the undivided attention and services of his counsel by the action of the trial judge.

Your petitioner further submits, by the pronouncements made by the trial judge, that he was held to be answerable on the theory of agency for the acts of the said Willard E. Warren, against whom the evidence presented was not utilized, the proceedings having been dismissed against him respecting the various counts under which your petitioner was being tried. Petitioner can demonstrate at a hearing that everything pertaining to his trial was unfair and violated the due process provisions and the kind and character of trial guaranteed to an accused under the Constitution of the United States.

Your petitioner submits that he was found guilty on counts 1, 2, 3, 4, 5, 6, 12, 13, 14, 15, 16 and 17, as charged in the indictment. It was confessed by counsel for the Government that error existed in respect to count 15.

The opinion of the Circuit Court of Appeals was handed down on the 23rd day of April, 1947. It is officially reported in 161 F. (2d) 299.

Before the Circuit Court of Appeals there were 35 assignments of error and four additional points in the statement upon which petitioner relied on appeal. The opinion of the Circuit Court of Appeals failed to consider any but two of said points, and erroneously invoked 28 U. S. C. 395, and failed to commit itself as to any particular count of which petitioner was convicted, said opinion in a cursory manner merely indicating that your petitioner was guilty of some unspecified count. Incidentally, your Honor will note that the United States Circuit Court of Appeals reversed the conviction as to the two corporate defendants, but failed to reverse the conviction as to your petitioner, thus departing from the well established doctrine that where three persons are tried for a conspiracy and on the judgment it was nullified as to two, the third and singular person is entitled to a new trial.

Your petitioner submits that the applicability of the holding of Ballard vs. United States, 91 L. ed., 195, was not presented to the Circuit Court of Appeals in the original appeal, but was presented after the opinion was rendered by a supplement to the petition for rehearing. It was further established that the Circuit Court of Appeals at the time of its decision did not have before it the grounds presented for a continuance.

The petition for rehearing was filed on the 22nd day of May, 1947. Petition for rehearing was denied on July 8, 1947. Within the time provided by law your petitioner herein applied to the Su-

preme Court of the United States for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circut. This application was denied on or about the 13th day of October, 1947, without any opinion so far as your petitioner can ascertain.

Your petitioner submits that he has discovered since the proceedings hereinbefore had that the trial judge committed prejudicial and reversible error, he having gone on record that he had at the early stages of the trial, and before the defendant had offered any evidence in his behalf, reached a conclusion that he was proceeding with a trial as though the defendant had pleaded guilty. This is the first time in these proceedings that this all-important point has come to the knowledge and attention of your petitioner.

Your petitioner submits that at the time of his conviction the definitive rulings on the vital import of the questions of law preserved by the motions to quash by petitioner, and made during the trial, had not crystallized.

Petitioner, therefore, respectfully submits that the circumstances backgrounding and derogating the trial and the failure through no fault of petitioner to have vital and material matters presented to the Circuit Court of Appeals prior to the rendition of the decision, are exceptional, and under the authorities of the Supreme Court of the United States present proper grounds for relief through the remedy of a writ of habeas corpus.

Wherefore, your petitioner prays a writ of habeas

corpus to the end that he may be discharged from custody and the judgments and commitments under which he is held be nullified and declared void; that a time be fixed for hearing on his application so that this Honorable Court may make inquiry into the matters and things herein related, and that pending the action of this court on the within matters and proceedings he be admitted to bail.

/s/ JACOB MORRIS DANZIGER,
Petitioner.

/s/ A. BRIGHAM ROSE,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss:

Jacob Morris Danziger, being first duly sworn, deposes and says: that he is the petitioner named in the foregoing petition for a writ of habeas corpus; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge and belief except as to matters stated therein on information and belief, and as to those matters he believes it to be true.

/s/ JACOB MORRIS DANZIGER.

Subscribed and sworn to before me this 1st day of December, 1947.

[Seal] /s/ MAUD RICHARDSON,
Notary Public in and for the County of Los Angeles, State of California.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Petitioner was denied of his constitutional rights secured by Articles 5, 6, and 14 of the Constitution of the United States.

Constitution of the United States, Amendments to Articles 5, 6 and 14.

II. The motion to quash the indictment because petitioner was indicted by an illegally constituted Grand Jury was indicted on hearsay, should have been granted.

Ballard vs United States, 91 L. ed. 195.
Zap vs United States, 91 L. ed., 688.

III. The denial to petitioner of the undivided attention and services of his counsel, and the appointment over objection of petitioner's counsel to represent the two corporate codefendants tried for the conspiracy, violated the Bill of Rights.

Glasser vs United States,
315 U. S. 60, 86 L. ed. 681.

IV. Where a scheme alleged is of one kind and another is proved, the variance is fatal.

Beck vs United States,
145 F. 625.

V. Under the sixth amendment to the Constitution of the United States, the defendant must be

tried in the district where the offenses were committed.

Freeman vs United States,
20 F. (2d) 748.

VI. Where a judgment of conviction as to two or three defendants charged with conspiracy is set aside, it is incumbent to set it aside as to the singular or third of the defendants.

Fader vs United States,
257 F. 694.

Cofer vs United States,
37 F. (2d) 677.

VII. Where a trial and sentence of a Federal Court violated specific constitutional guarantees, a writ of habeas corpus will issue.

Callan vs Wilson,
127 U. S. 540;

Johnson vs Zerbst,
304 U. S. 458;

Bowen vs Johnson,
306 U. S. 19, 27.

ORDER

Upon reading and filing the within petition for a writ of habeas corpus, the clerk of this court is hereby directed to issue under the seal of this court a writ of habeas corpus, directed to the United States Marshal for the District herein, requiring

him to make a return thereto as required by law, on the 5th day of January, 1947, at the hour of ten o'clock A. M.

It is Further Ordered that pending the hearing and determination of the proceedings on habeas corpus herein presented, the petitioner, Jacob Morris Danziger, be admitted to bail upon the posting of a good and sufficient surety bond in the sum of Five Thousand Dollars ($5,000.00).

Dated: Los Angeles, California, December 1st, 1947.

/s/ PEIRSON M. HALL,
District Judge.

Service Acknowledged Dec. 1947

[Endorsed]: Filed Dec. 1, 1947.

[Title of District Court and Cause.]

RETURN ON WRIT OF HABEAS CORPUS

I, Robert E. Clark, United States Marshal for the Southern District of California, respondent herein, for my return to said writ of habeas corpus in the above case state:

I.

That Jacob Morris Danziger, hereinafter referred to as the petitioner, is not being illegally restrained by me of his liberty, but that until released on bail by order of this Honorable Court was in my custody under proper and lawful authority.

II.

That on the 1st day of December, 1947, the petitioner surrendered to the custody of the United States Marshal under authority of a judgment of the District Court of the United States, Southern District of California, Central Division, and a commitment issued thereunder in that certain action theretofore litigated in the said District Court under the title United States of America v. Jacob Morris Danziger, et al., No. 15173-Criminal; that following the conviction of said Jacob Morris Danziger in said action, an appeal was taken by petitioner to the United States Circuit Court of Appeals for the Ninth Circuit; that said appeal was decided adversely to petitioner; that petitioner thereon petitioned the United States Supreme Court to issue its writ of certiorari for review of said conviction and that the Supreme Court of the United States denied petitioner's application for such writ of certiorari; that thereafter a mandate in usual and proper form duly issued in said action and on the 1st day of December, 1947, was spread upon the Minutes of this Honorable Court, whereon petitioner was committed to the respondent herein, the United States Marshal, for the execution of the judgment. A copy of said commitment is annexed hereto as Exhibit "A" and by this reference is incorporated herein and made a part hereof.

Wherefore, I, Robert E. Clark, United States Marshal for the Southern District of California, respectfully pray that the writ of habeas corpus

herein be dismissed, the bail thereon exonerated, and petitioner returned to the physical custody of the respondent.

ROBERT E. CLARK,
U. S. Marshal.
By /s/ RAYMOND A. RANSDELL,
Deputy U. S. Marshal.

State of California,
County of Los Angeles—ss.

Raymond A. Ransdell, being first duly sworn, deposes and says:

That he is the Deputy United States Marshal in charge of the office of the United States Marshal at times the United States Marshal personally is not present therein; that he makes the aforesaid return upon behalf of the United States Marshal and his Chief Deputy; that he has read the same and knows the contents thereof and that the same is true to the best of his knowledge and belief.

/s/ RAYMOND A. RANSDELL,

Subscribed and sworn to before me this 5th day of January, 1948.

[Seal] /s/ EDMUND L. SMITH,
Clerk of the U. S. District Court.

EXHIBIT "A"

District Court of the United States, Southern District of California, Central Division

No. 15,173—Criminal

UNITED STATES

vs.

JACOB MORRIS DANZIGER

JUDGMENT AND COMMITMENT

In Secs. 17 counts for violation of Secs. 17 (a) (1) & 5(a) (2), Securities Act of 1933 (15 USC 77q(a) (1), e(a) (1); Sec. 37 of Crim. Code (18 USC 88); Sec. 215 of Crim. Code (18 USC 338).

On this 10th day of February, 1945, came the United States Attorney, and the defendant Jacob Morris Danziger appearing in proper person, and by counsel, A. Brigham Rose, Esq., and

The defendant having been convicted on finding of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: Counts 1 to 6, inc.: unlawfully using the US mails to employ a scheme and artifice to defraud, etc. 15 USC; Counts 12 to 16, inc.: unlawfully using the US mails in furtherance of the scheme and artifice to defraud, in violation of Title 18 USC 338); and Count 17: conspiring with others to commit the aforesaid acts in violation of Title 18 USC, Sec. 88; as more fully set forth in said counts of the indictment herein; and the defendant having been now asked whether

he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of fifteen (15) months on each of counts 1, 2, 3, 4, 5, 6, 12, 13, 14, 15, 16 and 17, concurrently (total term of imprisonment fifteen (15) months.

On each of count 7, 8, 9, 10 and 11, the Court finds the defendant not guilty.

It is Further Ordered that the defendant be forthwith remanded to custody of the U. S. Marshal.

It is Further Ordered that bond of the defendant be, and it hereby is, exonerated.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ CLAUDE McCULLOCH,
United States District Judge.

Filed this 10th day of February 1945.

/s/ EDMUND L. SMITH,
Clerk.

By /s/ E. N. FRANKENBERGER,
Deputy Clerk.

[Endorsed]: Filed January 5, 1948.

[Title of District Court and Cause.]

TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS

The above named petitioner, Jacob Morris Danziger, in answer to the return of Robert E. Clark, United States Marshal for the Southern District of California, to the writ of habeas corpus, herein respectfully shows that the commitment returned by the said Robert E. Clark, United States Marshal as aforesaid, as the cause of your petitioner's detention, is void and of no effect and was issued in violation of your petitioner's rights, privileges and immunities under the Constitution and laws of the United States, for the following reasons:

I.

Your petitioner, as a citizen of the United States, under Article 5 of the Amendments to the Constitution of the United States, was by said constitutional proviso secured against being deprived of his liberty without due process of law.

II.

That pursuant to Article 6 of said Amendments to the Constitution your petitioner was entitled to enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, to be informed of the nature and the cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Your petitioner respectfully submits and alleges that, contrary to said constitutional provisos and safeguards, his commitment under a purported judgment of conviction was procured contrary to and more especially in direct violation of the spirit, essence and the terms of said constitutional safeguards, and in support of these contentions and assertions on his part petitioner submits the following contentions:

(a) That he was indicted by a grand jury on December 30, 1941, which grand jury was, under the authoritative Supreme Court decision of Ballard vs. United States, 91 L. ed. 195, so constituted that it could not return a valid indictment.

(b) That subsequent to the filing of said indictment, to-wit: at the time of trial, as your petitioner will disclose, his indictment had been procured solely on hearsay evidence.

(c) That, following the return of said indictment, notwithstanding that your petitioner at that time, and ever since the filing and return of said indictment, has been a resident of the state of California, county of Los Angeles, whose residence was known, respondent nevertheless failed to make any effort to arraign your petitioner prior to December of 1944.

(d) That the Government of the United States of America, without prior or proper notice, brought

your petitioner to trial on a charge of conspiracy on January 16, 1945, although at that time no other defendant, other than petitioner, had been arraigned on any charge pending against him, save and except a defendant named Warren (alias Carter, etc.), against whom all charges had been dismissed except one count, prior to the bringing to trial of your petitioner.

(e) That for the first time, to-wit: on said date of January 16, 1945, your petitioner was joined for trial with two corporate codefendants who had not been arraigned prior to said trial date, and who, incidentally, were not represented in court, even at the date of said arraignment, and that a trial for conspiracy was commenced on said date against these two corporate defendants and your petitioner. That your petitioner's counsel, over violent objection and protest, was by the trial judge directed to represent all three of said defendants, whose interests were adverse and conflicting. In this regard petitioner submits that the various exhibits and the various counts set forth in the indictment will and do reflect that the acts sought to be charged against this petitioner were the acts of the said corporate defendants.

(f) That petitioner, at the time he was thus suddenly forced into a trial after a delay of over three years, was deprived and denied the opportunity to have witnesses produced in his behalf; that his sworn affidavit for a continuance presenting this

situation was recognized by the trial judge and its importance confessed, but, nevertheless, petitioner's rights under Article 6 of the Amendments to the Constitution of the United States were denied provisionally.

(g) The record reflects that the trial judge confessed that the showing made by petitioner of his inability to proceed by reason of the sudden arraignment, after years of delay, was serious. However, nevertheless, the trial judge, by his declarations of record, led petitioner to believe that he, because he was an out-of-state judge, was disposed to appoint petitioner's counsel, over his objection, as attorney for these two corporations, subject to subsequent developments, and commence the trial on the charges contained in the indictment, with the reservations, until the evidence produced by the Government would indicate the necessity of a continuance and the taking of depositions of persons residing in European countries, at a time when our Government was in a state of war.

Petitioner, recognizing that a procedure along these lines could not validly be had with a jury, was thus, by the conduct of the trial judge, forced into a position of being required to waive trial by jury, which would not have been waived under other circumstances. Moreover, it is now revealed, by the declaration of the trial judge, made February 17, 1945, in open court in the absence of petitioner and his counsel, that the said trial judge was proceeding on the theory that the petitioner had indeed entered

a plea of guilty. We respectfully refer to the heretofore unknown judicial declarations, which appear of record to have been made February 17, 1945, and which are as follows: * * * it was so evident from an early state of the case, that I was practically dealing with a guilty plea by the defendant Danziger * * * the practical situation was that I had a defendant before me who was contesting a charge to which he had pleaded guilty, so conclusive were the admissions which had been drawn from him by Mr. Mainland during that examination and so obvious was the perjury the defendant was committing in attempting to explain away the uncontrovertible facts that the examination developed * * * "

Your petitioner submits that the said declarations of the trial judge manifestly reflect that he formulated an opinion before the evidence had been submitted in behalf of the defendant, and that the said trial judge, contrary to his judicial authority, had been accountable for divesting your petitioner (1) of his opportunity to produce witnesses in his behalf; (2) to afford him an opportunity to establish the bonafides of his activities; and (3) to have the issues of fact tried by an impartial jury.

(h) Your petitioner contends, and refers to the entire record evidence adduced in this case, that the same fails to show any semblance of a form of conspiracy in fact formulated or existing for which this petitioner would be called upon to be personally accountable or responsible. Your petitioner submits in this behalf that there is not a paucity of evidence,

or that, indeed, there is no evidence, that the Government cannot in good faith point to any portion of this record whatsoever to show that any legal evidence was adduced or presented which will support any charge contained in the indictment.

(i) The Government in the case of your petitioner has, contrary to the constitutional provisos and the statutes and law, sought to hold petitioner answerable for the machinations and acts of one Warren (Carter, etc.) against whom the Government dismissed 16 counts and whose own testimony shows that he even is not guilty of the count to which he pleaded guilty, to-wit: count 17.

(j) That in the purported trial of your petitioner, the Government sought to hold petitioner accountable for the acts of the said Warren (Carter, etc.) without the slightest pretense of establishing any foundation or presenting any legal proofs, or competent evidence. Contrary to fundamental principles of justice, the Government abandoned and dismissed the charges for the acts of Warren himself, and sought to, and have saddled upon your petitioner accountability for said unauthorized and unestablished agency. Your petitioner respectfully submits that the record evidence will itself unequivocally show that he is being held to account for the pecadillos of a person against whom the Government abandoned and dismissed its charges, and for which, contrary to fundamental legal principles, the Government is seeking to imprison your petitioner, not for any misfeasance or malfeasance on his part,

but for the acts of others with whom he was not in privity, or for whose conduct he is not in contemplation of law legally accountable.

(k) Your petitioner respectfully shows that in respect to his appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit, said Circuit Court was not disposed to examine or consider all of the assignments of errors or the record evidence, that Government counsel has confessed error in count 15 of the indictment, which has not previously received any consideration and which confession strikes down count 17 of the indictment, which is the only count in which your petitioner was jointly tried with any defendant who stands convicted after trial or by plea. That your petitioner is prepared to show by the testimony of the Government witnesses itself that count 17 has not and cannot be sustained.

(l) That it was discovered after the opinion rendered by the Circuit Court that the Court and Government counsel at no time considered the merits of the application of petitioner for a continuance based on his inability under the circumstances to produce witnesses in his behalf in respect to vital and essential issues framed by the indictment.

(m) That the motion to quash the indictment on constitutional grounds that the grand jury was not properly constituted or qualified to return the indictment was not at the time of taking of the appeal by your petitioner herein crystallized by the subsequent decision rendered by the Supreme Court of

the United States as now established by the Ballard case.

(n) That petitioner submits that since the Circuit Court of Appeals reversed the conviction as to the two corporate defendants of your petitioner, under the doctrine enunciated in the case of Feder vs. U. S., 257 Fed. 694, and Cofer vs. U. S., 37 Fed. (2d) 677, a new trial should have been ordered as to your petitioner.

(o) Your petitioner submits that an examination of the record of the proceedings culminating in his conviction will show that he has never had the points raised by him adequately considered or passed upon.

(p) That your petitioner is the victim of arbitrary judicial conduct, and a fair and reasonable examination of the proceedings will reflect that no semblance of due process has been afforded him, to which record your petitioner now refers, with the same force and effect as if the said record were incorporated herein and set forth at length.

Wherefore, petitioner prays for an order discharging him from the custody of the said United States Marshal.

/s/ A. BRIGHAM ROSE,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss:

Jacob Morris Danziger, being first duly sworn, deposes and says: That he is the petitioner herein;

that he has read the foregoing Traverse to Return to Writ of Habeas Corpus, and knows the contents thereof, and that the same is in all respects true.

/s/ JACOB MORRIS DANZIGER.

Subscribed and sworn to before me this 12th day of January, 1948.

[Seal] /s/ MAUDE RICHARDSON,
Notary Public in and for the County of Los Angeles, State of California.

Service acknowledged January 12, 1948.

[Endorsed]: Filed January 12, 1948.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Peirson M. Hall, U. S. District Judge.

I have examined the transcript of record on appeal with particular reference to the assignment of errors on appeal. I have also examined the petitioner's brief and reply brief on appeal in the Circuit Court, the petition for rehearing, and supplement to petition for rehearing, and the briefs of both parties thereon, the petition for certiorari to the Supreme Court and the supplemental transcript of record filed therewith, as well as the supporting and opposing briefs thereon. And it appears, with one exception to be noted hereafter, that the matters and things raised in the petition for writ of habeas corpus, and at the hearing, and argument

and in the briefs were previously raised by petitioner in his appeal proceedings either in the Circuit Court or in the Supreme Court.

In the decision of the Circuit Court of Appeals (161 Fed. (2) 229) affirming petitioner's conviction, the court indicated it had considered all of the points and things raised by petitioner, but not specifically discussed in the opinion, and found no error.

The petition for rehearing was denied by the Circuit Court without opinion, as was the petition for certiorari by the Supreme Court. While it is true that mere denial of a petition for certiorari is not to be deemed an affirmance of all of the propositions of law which may have been stated or touched on in the lower court's opinion, I cannot agree with petitioner that such denial indicates no consideration of the matters and things covered in the petition. But I must on the contrary, hold that such denial was made upon appropriate judicial consideration, and is the law of the case as to all points raised in either or both the petition for rehearing and petition for certiorari.

Whatever the boundaries are of the power of a District Court under the writ of habeas corpus (See Sunal vs. Large, 332 U. S. 175, and its dissents, for a general discussion of the necessity of keeping such boundaries flexible) it cannot be said that there lies within such boundaries the power of a United States District Court to act as a reviewing court on a habeas corpus proceeding to both the Circuit Court of Appeals and the Supreme Court

on matters and things previously considered and decided by such Appellate Courts on appeal in a specific case. And that is what the petitioner here asks, with a view to getting a different result, which amounts to a request for a reversal by the District Court of both the Circuit Court of Appeals and the Supreme Court.

The new thing brought into these proceedings is a statement by the trial judge after the conclusion of the trial, and after the notice of appeal, to the general effect that it had become evident to him from an early stage of the trial that he was practically dealing with a "guilty plea" because of admissions of the defendant which had been reduced to writing, and introduced in evidence.

If such statement indicated error on the part of trial judge during the trial, surely the petitioner waived it when he did not either include it as an assignment of error, or even bother to print it in the record on appeal of which, incidentally, there were over 1800 printed pages, which would indicate that petitioner himself a lawyer, and his learned counsel, were not without assiduity and diligence, to say nothing of the petition for writ of prohibition, the appeal, the petition for rehearing, and the petition for certiorari. But even if it were not waived, I can see no violation of due process, or of any other constitutional provision or of law, so as to entitle the petitioner to a writ of habeas corpus. The statement was made after the trial had concluded, and judgment and sentence had been pro-

nounced, and after appeal had been taken. It was made on a hearing in connection with bail, and as I read the record, was merely a way of emphasizing the importance of the defendant's admissions in connection with the refusal of the trial judge to grant bail on appeal.

Something should also be said about the other points made by the petitioner, which I suggested should be discussed in the briefs and on arguments.

One was the asserted error of the trial judge to grant petitioner's motion for a continuance based on the affidavit of petitioner filed at the commencement of the trial and the contention that such asserted error was not ruled on by the higher courts, because such affidavit was not contained in the transcript of record before the Circuit Court of Appeals, although it was in the supplemental record before the Supreme Court.

It must be pointed out that the petitioner never asked for a continuance after the filing of the affidavit, either at the conclusion of the government's case, when all of its evidence had been disclosed to petitioner, or at any other time, on the ground that the name or location of any witness, or of any evidence, not then available to him, either in any foreign countries or elsewhere, might aid in his case.

Moreover, the petitioner did raise the point before the Circuit Court of Appeals. In his brief to the Circuit Court of Appeals appears the following (pp 84-85)

"Specifications of Error"

"Appellants rely upon each and every one of their 35 Assignments of Errors set forth at pages 175 to 377 of the printed Record, which are set out in the appendix herein, commencing at page 3 to and including page 100. In addition to the errors thus specified, appellants have also designated in their statement of points upon which they intend to rely (R. 1844-1846) the following:

" 'In addition to said assignment of errors, appellants herein urge the following additional points:

(2) Error in denying the motion of the defendant Jacob Morris Danziger for a continuance by reason of the inaccessability of material records in countries foreign to the United States involved in the transactions specified in the indictment and to the impossibility of production of witnesses residing in foreign countries whose testimony would be material to the defendants.' "

It was petitioner's record. He made it. He was its architect and builder. He designated the things which it should contain. And if he did not think enough of the point, by putting his affidavit in support of it in the record, he cannot now have still another bite at the apple of judicial review by taking advantage of his own mistake in a habeas corpus proceeding.

It was also urged that petitioner was indicted by a Grand Jury upon which there were no women, and which accordingly was selected with "systematic and intentional exclusion" of some "economic,

social, religious, political, and geographical groups of the community," (Thiel vs. Southern Pacific, 338 U. S. 217), to wit, women (Ballard vs. U. S. 329, U. S. 187).

The petitioner's complaint is that the "definitive rulings" on this point had not "crystalized" within the ten days allowed to challenge the indictment from the date of the arraignment, allowed by Sec. 556 (a), Tit. 18 U. S. C., nor at any time before the decision of the Circuit Court of Appeals on his appeal.

Were this point before me de novo, I would be compelled to give heed to the fact that it had been raised in this District many times and had been considered settled for many years prior to the decision of the Supreme Court in the Ballard case, (a criminal case), that the exclusion of women from juries in the Federal Court in this District was no ground for challenging the legality of either a grand jury or a trial jury (see 35 Fed. Supp. 105, Oct. 8, 1940, and authorities there cited) and that to do so would be as futile as raising any one of hundreds of points raised before trial judges which have been settled by law and decision to the point where they are considered frivolous by the bench and bar, and that no authoritative precedent existed prior to the Ballard decision by the Supreme Court holding jury panels to be voted by the exclusion of women. (California decisions had been to the contrary) and that there has not been and is not now any written statute or rule, either Federal or State which specifically requires women not

to be excluded from jury selection, and that neither the Thiel case nor the Ballard case had been decided by the Supreme Court either at the time of the indictment, December 30, 1941, or within ten days from the date of arraignment of defendant, three years later, on the 20th of November, 1944. The Thiel case was not decided by the Supreme Court until May 20, 1946, (eighteen months after arraignment) nor the Ballard case until December, 1946, (over two years after petitioner's arraignment) nor the Zap case, (330 U. S. 800) until March 3, 1947, nor the Bell case (159 Fed. (2) 247) by the Circuit Court, until February 4, 1947.

In the Ballard, Bell, and Zap cases, the court held that the objection had been specifically raised within the ten day period of Sec. 556 (a) of Tit. 18; and in the Thiel case, that it was raised within the appropriate time for the objection to be made to the petit jury panel in civil cases.

The effect of these decisions is that if the point is not so specifically raised within the statutory time, it is waived. (See 329, U. S. at 190). It is held in this circuit by Redman vs. Squier, 162 Fed. (2) 195, that such failure to raise the point is a waiver.

But petitioner contends that he did not waive the point by failing to raise it within the required time, as he contends that the point was actually raised on his motion to quash, which was timely filed.

The motion to quash (record 68-69) did not specifically state his objection to the jury panel, and did not mention, even in a general way any asserted

violation of the due process clause or general non-compliance with the laws or statutes of the United States. But the motion was confined to the objection that the three year delay of arraignment was in violation of the Fifth Amendment, the Sixth Amendment, and the laws and statutes pertaining to arraignment.

While this may be so, from a literal reading of the motion, the petitioner, nevertheless, asserts that the general objection of violation of due process, and of the laws and statutes of the United States was raised by filing the motion, because in support of his motion to quash, he stated to the court in argument on the motion as follows: (R. p. 179.)

"I address to your Honor a motion to quash the indictment upon the grounds that the same was procured contrary to the laws of the United States, in violation of the constitutional provisos, namely, due process, the equal protections of the law and the statutes in cases concerning the subject of the requisite evidence and character of evidence that is essentially required in order to vote an indictment against an accused and put him to trial."

As I read the above statement, it was not a general charge of denial of due process or a general charge of violation of the laws and statutes of the United States, so as to provide an umbrella for all specific questions which might thereafter be raised, even for the first time on argument on appeal to the Supreme Court, (such as occurred in Mission vs. Utah, U. S. Supreme Court, Oct. 1947 term, No. 60,

Feb. 8, 1948.). It rather appears to have been specifically and only a charge that the "requisite evidence and character of evidence that is essentially required in order to vote an indictment" was in violation of the due process clause, the Sixth Amendment and the laws and statutes of the United States in that particular only.

Whatever might be said for the proposition that a defendant and the lower courts should not be put to guessing as to what might be some day considered as error by the Supreme Court in an exercise of its "powers of supervision over the administration of justice in the Federal Courts" (328 U. S. 225; 329 U. S. 193) it must be conceded that neither the trial court nor the Circuit Court of Appeals could have guessed from the record and proceedings in the trial court that petitioner intended either his motion or the above statement in support thereof to be an objection to the grand jury panel.

Here it must be noted that while the petitioner is urging the invalidity of the grand jury panel as a constitutional question, the dissenting opinion of Justice Frankfurter in the Thiel case indicated that no constitutional question was involved (328 U. S. 227). And that in neither the Thiel case, nor the Ballard case majority opinion is there any indication that they held the jury panels to be invalid as being in violation of any constitutional right.

Petitioner relies upon the Thiel case and the Ballard case, so it is not clear, therefore, in precisely what fashion he claims due process was denied him in the selection of the jury panel, unless it be that

the Supreme Court having found the grand jury which indicted Ballard to be illegal, it is a denial of due process not to make the same holding as to petitioner, or that Section 556 (a) of Tit. 18 requiring such an attack to be made within ten days after arraignment is unconstitutional as being a denial of due process.

But in any event, the question as to the validity of a jury panel was specifically raised in the Circuit Court of Appeals on the petition for rehearing (see supplement to petition for rehearing filed in C. C. A. June 11, 1947), after the decision of the Supreme Court in the Ballard case. It was also raised in the petition for certiorari to the Supreme Court (petition page 17) and while both of these petitions were denied by the Circuit and Supreme Courts, without opinion, I must accept their denial as their conclusion that the point was not well taken, or had been waived by petitioner. And as indicated at the commencement of this memorandum, I cannot sit as a reviewing court of either the Circuit Court of Appeals or the Supreme Court.

The other point which was discussed at some length on argument, and in the briefs, was that petitioner was deprived of right of trial by jury. In face of the written waiver signed by both the petitioner and his counsel, the position of petitioner is a little vague and tenuous, to say the least.

No physical force or deceit is alleged to have been exercised or practiced upon either petitioner or his counsel. Nor is there said to have been any ignor-

ance on the part of petitioner or his counsel of his right to trial by jury. It seems to sum up to this: that petitioner, after the motion for continuance was denied, consulted with his counsel, and concluded that if it might become necessary for a continuance during the trial, he would fare better at the hands of the Judge, than at the hands of a jury, which might become separated during such continuance. The petitioner was not deprived of anything in this respect. He made a deliberate and consultative choice. He took a calculated risk, in which his counsel joined. If such a risk produced a result he did not expect or want, he cannot now be heard to complain that because the result was not to be expected, he was denied a constitutional right, and should be liberated on a writ of habeas corpus.

I have extended the within memorandum more than would be ordinarily necessary, but have done so in order that counsel might not be required to guess as to the basis of my rulings.

The writ is denied.

The petitioner is ordered remanded, and his bail is exonerated upon his delivery into custody.

Los Angeles, California, March 18, 1948.

[Endorsed]: Filed March 18, 1948.

[Title of District Court and Cause.]

ORDER DISCHARGING WRIT OF HABEAS CORPUS AND REMANDING PETITIONER TO CUSTODY

Be It Remembered that the petition of Jacob Morris Danziger, petitioner herein, for a writ of habeas corpus, came on regularly to be heard in the above entitled Court on March 1, 1948, before Honorable Peirson M. Hall, Judge Presiding. Petitioner was personally present and represented by A. Brigham Rose, Esq., his attorney. Respondent, Robert E. Clark, United States Marshal for the Southern District of California, was represented by James M. Carter, United States Attorney, by Ernest A. Tolin, Chief Assistant United States Attorney. The Court having received evidence both oral and documentary and having heretofore made its Findings of Fact and Conclusions of Law:

It is Ordered, Adjudged and Decreed that the writ of habeas corpus heretofore issued herein be, and the same is, hereby discharged. Petitioner, Jacob Morris Danziger, is remanded to the custody of Respondent, Robert E. Clark, United States Marshal for the Southern District of California; and upon such delivery to such custody, his bail given herein shall be exonerated.

Dated this 8th day of July, 1948.

/s/ PEIRSON M. HALL,
U. S. District Judge.

[Endorsed]: Filed and entered July 9, 1948.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, February 2, 1948

Appearances:

For the Government:

JAMES M. CARTER,
U. S. Attorney,
Los Angeles 12, California, by

ERNEST A. TOLIN,
Assistant U. S. Attorney.

For the Petitioner:

A. BRIGHAM ROSE, ESQ.,
408 South Spring Street,
Los Angeles 13, California. [1*]

* * *

The Court: I received the briefs that were filed in this matter, they were forwarded to me at Phoenix, and I had some time to read them.

It seemed to me that all of the points that you have raised—I will not say all of them; I will say most of them—were disposed of on the appeal.

Mr. Rose: Disposed of, your Honor, by failing to cite them.

The Court: The court said that all the other points were considered and there is nothing to them. There was, however, one point which you raised which was new and that was that the judge de-

* **Page numbering appearing at bottom of page of original certified Transcript of Record.**

clared from the bench that he was going to try the case as if the defendant had pleaded guilty. That is in substance.

Mr. Rose: He didn't make that observation from the [2] bench, he made it subsequently and I haven't introduced that yet. I want to introduce that. Here is the important——

The Court: Just a moment. That point was not involved on the appeal. It was not clear what the factual situation was in connection with it, and the matter was not, as I recall, discussed by the United States Attorneys in their briefs. I do not know whether they failed to do that because the factual situation was not clear to them or not.

The other point that seemed to me to be involved in connection with this matter was whether or not there had been a waiver by Danziger of his right to challenge the jury. The record in the Ballard case was not there available to me and I do not know whether it is available here. The record in this case was not there available to me when I had your briefs and I have not had an opportunity to look at it since.

Mr. Rose: The Ballard case, your Honor, was not decided at the time that this came up.

The Court: I know that. But the point is whether or not there was a waiver.

Now the Supreme Court's decision in the Ballard case stated that they made a motion to quash the indictment on the ground that it was in violation of whatever amendment they mentioned, the

Fifth Amendment or the Fourteenth Amendment, and because there were no women on the jury. They did not in their decision indicate which one of those they considered [3] it was a failure to waive. I suppose that specifically raising the point might have been considered in that case. But in any event, it is not clear in this case what the proceedings were.

Mr. Rose: May I ask your Honor if you have had an opportunity to read that transcript of the record?

The Court: No, I do not know where it is.

Mr. Rose: I filed it here.

The Court: It is here but it was not sent to me.

Mr. Rose: May I add this to it?

The Court: What is this, evidence?

Mr. Rose: It is a supplement to the record which was omitted when it went up to the Circuit Court of Appeals.

The Court: Have you seen it, Mr. Tolin?

Mr. Tolin: I have not seen it, your Honor.

Mr. Rose: That is the supplement to the record regarding the affidavit of continuance and your telegram stipulating that it may be added to the record after the decision.

The Court: What I have been saying has been preliminary to what I am about to say now. Neither of the parties briefed the question as to whether or not a general motion to dismiss on the denial of constitutional rights is sufficient to have raised the question that there were not women on the grand jury without specifically mentioning them. If that was your motion and if that is sufficient to have

raised the [4] question, then it would not be a waiver and neither the Supreme Court nor the Circuit Court of Appeals have indicated by their decisions what constitutes a waiver or what constitutes a failure to waive.

Mr. Rose: I will state this to your Honor, frankly, my personal view is that the broad grounds upon which I specifically presented the motion to quash in my opinion were comprehensive enough to reserve the point in view of the fact that the views of the Supreme Court on that specific objection had not yet crystallized and, frankly, I will tell your Honor in all candor why I didn't go into that matter in this brief is because I was personally impressed with your verdict in the Local 36 case, in which you reviewed the views of the Supreme Court in the Thiel case and in the Ballard case, and for that reason I felt that that subject might better be discussed so I could get your Honor's view on that.

The Court: I am giving you now the query that is in my mind which, as I say, was not discussed in either one of the parties' briefs, and that is, what constitutes a waiver.

Mr. Rose: Your Honor, there are two points that I consider are of vital importance and more in the nature of a denial of due process than anything else. There seems to have been confusion, as I pointed out perhaps not with particularity in my brief, they are confusing the mandate which requires the arraignment of a defendant promptly with the [5] failure of a defendant after he is ar-

raigned to take steps to expedite the trial on the merits.

The Court: Counsel, that point was squarely decided by the Circuit Court of Appeals.

Mr. Rose: No.

The Court: They said that the record was there and the Circuit Court of Appeals said that because he was not arraigned within three years' time, or whatever it was, that it was not the government's fault, that he could have gone up. I am not saying that I would have decided the case that way.

Mr. Rose: I do not believe they say because he was not arraigned, I think they say because he was not brought to trial. That is where I think the confusion arises.

The Court: You filed a petition for rehearing and you gave them a chance.

Counsel, if that question were initially before me and had not been decided by the Circuit Court of Appeals——

Mr. Rose: I don't think it has been decided, your Honor.

The Court: ——then it is quite likely that I would reach a different conclusion than they have reached, but I cannot sit here and review on a habeas corpus matter the decisions of the reviewing courts.

Mr. Rose: They are not binding on you. I will tell your Honor what I consider the two very important points [6] other than those that have been cursorily passed on here in this discussion. I believe that the conduct of the trial court in forcing

Danziger to waive trial by jury is a point that could be raised for the first time on habeas corpus. I have had occasion to raise that point in the State court by way of coram nobis.

The Court: But you raised that point.

Mr. Rose: But the court didn't pass on it.

The Court: Yes, it said all the other points are considered but they do not amount to anything.

Mr. Rose: I think they have violated the statutes of the United States because they can't dispose of issues in that manner.

The Court: They do all the time.

Mr. Rose: They haven't any jurisdiction nor any authority to do it. They must state that they have read the entire record.

The Court: But you have filed a petition for certiorari to the Supreme Court and they were the people to complain to, not to me.

Mr. Rose: The Supreme Court of the United States, as I have been informed, when they opened their October session denied every application for certiorari that was presented before them during that recess.

The Court: I do not think so. They granted that one [7] with regard to the Japanese land law and to others around the country.

Mr. Rose: Not any criminal proceedings.

The Court: I do not remember.

Mr. Rose: Of course I don't have to tell you that denial of certiorari by that court is to be regarded as equivalent to the fact that they even consider matters raised in the petition.

The Court: The Supreme Court has stated that denial of certiorari is not to be regarded as an affirmance of the opinion; it is merely a refusal to review it.

Mr. Rose: I take the view that the United States Supreme Court is not the forum before which matters such as are raised here should be saddled upon that court, with all of the business they have. I think that habeas corpus properly and invariably belongs in a trial court where a court can take evidence if necessary and where they have time to consider it.

The Court: You started out with the idea in suggesting that Mr. Danziger was sick and you were not ready to proceed.

Mr. Rose: Yes.

The Court: I interrupted you in an endeavor to give you an idea of the matters upon which I would like to have further briefs of counsel, and on only those two matters, unless you wish to add to your brief now concerning the distinction [8] between going to trial and failure to arraign.

Mr. Rose: What is your view, your Honor, on whether a Circuit Court has the authority to make an omnibus statement without passing on any of the points?

The Court: My view is immaterial because they do it anyhow.

Mr. Rose: But that doesn't divest your Honor of still affording a citizen the rights guaranteed to him under the Constitution.

The Court: If you were citing this case in con-

nection with and as authority for some other case, then I would be quite apt to disregard that statement. But in this case the Circuit Court's opinion is the law in that case and when they say that we must indulge the presumption that the judges of the Circuit Court have obeyed the law and if they are required by law to read all the briefs to pass upon it we must indulge the presumption that they have read and considered each one.

Mr. Rose: But I have it on record that they have no intention of reading the entire record, as Mr. Tolin suggested they do. And while my mind is in focus with that observation, I would like your Honor to keep in mind it is my intention in this proceeding that there is no evidence to support the charges contained in the indictment.

The Court: You contended that before the Circuit Court [9] of Appeals.

Mr. Rose: There is a difference between where you contend the evidence is insufficient and where you contend there is no evidence. I was very encouraged at the time I argued that matter up there. They allowed me twice the usual time, struck the government's brief, had us come back for argument again, and Mr. Justice Denman asked Mr. Tolin, he said, "I don't know about my associates here but as far as I am concerned I would like you to tell me what this so-called conspiracy was about, and between whom." That suggestion of Mr. Justice Denman's remains unanswered to date. [10]

* * *

Mr. Rose: May I file these as a supplement to the rest of the transcript?

The Court: They are filed.

Mr. Rose: If your Honor is going to read this transcript——

The Court: I do not know whether I am going to read that whole transcript or not. I am going to read enough of it to understand if I have an understanding of your points involved. I am going to review it to find out, if you will call my attention to it, what you claim was your motion to quash which preserved your constitutional right to have the indictment quashed because there were no women on the jury or grand jury.

In that connection, I think counsel for the United States Attorney should also treat of the proposition, which has been said so many times in connection with all kinds of [12] lawsuits, that the question as to the sufficiency of the indictment can be raised at any stage of the proceedings, and in this case it was not raised so that the Circuit Court of Appeals noticed it and it might have been raised but at least the first notice they took of it was after their decision and on the motion for a rehearing and subsequent to the decision of the Supreme Court in the Ballard case and before final judgment in this case, because the judgment does not become binding in this case on the appeal until the mandate comes down. Now, if he can raise the question as to the sufficiency of the indictment at any time before final judgment, I suppose he might even be

able to raise it here on a motion to spread the mandate. I do not know.

Mr. Tolin: Of course the mandate has been spread.

The Court: It has now, but that question was specifically raised before the mandate was spread.

Mr. Tolin: I wonder if your means by question the sufficiency of the indictment the question of the manner in which the indictment was obtained.

The Court: Yes. It is the same idea. [13]

* * *

The Court: I just want to see if counsel in these matters are ready and then I will get to them. Are you ready?

Mr. Rose: That depends upon your Honor's disposition. It occurs to me your Honor's disposition in that sense is good but what I had in mind was this, I have a few additional cases that have not heretofore been presented and I would like your Honor to consider them. Would it be all right for me to mention them this morning or would you like a memorandum?

The Court: I think that probably about now should be the time when we stop filing memoranda in this case.

Mr. Rose: Very well. Then there is one other matter. I have my alternative under the authorities of putting on oral evidence on one question here or I can present it by way of affidavit, whichever is preferable.

The Court: If you are referring to the remarks

of the [17] judge at the time of the trial, which you say for the first time is now being called to the attention of the court, and which are generally to the effect that he was trying the case as if it were a plea of guilty, I do not think there is any challenge to the fact that the record shows the judge made the statement. [18]

* * *

The Court: Let me get some dates in my mind. The indictment was returned when?

Mr. Rose: In '40 or '41.

The Court: I have the printed record here. It does not appear in it. The indictment is here but I do not see the date that it was filed.

Mr. Rose: That will be on the last page. It is '41, isn't it?

The Court: December 30, 1941.

Mr. Rose: That is right.

The Court: When was the arraignment?

Mr. Rose: In November of '44. That was the first time he was arraigned.

The Court: The arrest? He had never been arrested before?

Mr. Rose: He had never been arraigned.

The Court: Had he been arrested?

Mr. Rose: You mean put in custody?

The Court: No, had a warrant been issued for him?

Mr. Rose: Yes.

The Court: Had it been served?

Mr. Rose: No.

The Court: When was the warrant issued?

Mr. Rose: Upon the return of the indictment.

The Court: In 1941?

Mr. Rose: Yes, your Honor.

The Court: And it was not served until?

Mr. Rose: And he was not brought into court until November of '44.

The Court: On the 20th day of November, 1944?

Mr. Rose: That is correct. And the corporations were not brought in until the date of trial.

Mr. Tolin: I had understood that he came in and posted bail at the time.

Mr. Rose: That was a voluntary act on his part.

The Court: When did he post bail?

Mr. Rose: In '41.

The Court: After the indictment?

Mr. Rose: After he had heard he had been indicted, he went up there and posted a bond.

The Court: Then there was never any warrant issued for his arrest?

Mr. Rose: No. And he had never been brought into court or—I will ask government counsel to show whether this matter was ever set for arraignment until October, some time three years later.

The Court: It was set for arraignment and he was arraigned on the 20th day of November, 1944?

Mr. Rose: That is correct. [24]

The Court: At which time you presented a motion to dismiss the indictment for want of prosecution?

Mr. Rose: Yes, before Judge Harrison.

The Court: Which was denied?

Mr. Rose: Which was denied on the ground, not that he disagreed that the motion was well taken, but he figured he didn't have the authority. He agreed with me in principle. He thought the motion should be granted, but he expressed a view that he thought that if he did that he would be reversed.

No, then, what I want to call your Honor's attention to is this——

The Court: Just a moment. I want to follow you. Then on the 20th of November he denied the motion, the defendant pleaded not guilty and the case was continued to December 18th at 10:00 o'clock a.m. for setting for trial?

Mr. Rose: That is correct.

The Court: And when was it set?

Mr. Rose: On that date.

The Court: It was set for trial on that date?

Mr. Rose: No, on that date the trial date I think was January 16. That is the date when we appeared before Judge McColloch and that is the date when the two corporations were brought into court for the first time as co-defendants, and that is when they arraigned the corporations.

The Court: There was a trial date of January 16? [25]

Mr. Rose: Yes.

The Court: And did the trial proceed on that date before Judge McColloch?

Mr. Rose: That is correct.

The Court: I am reading here from the pretrial conference. It does not indicate the date.

Mr. Rose: We didn't have any pretrial conference. What happened there, your Honor, was this: Judge McColloch did set a date for a pretrial conference, at which time I appeared, and so did the United States Attorney, but the defendant not being present, Judge McColloch refused to proceed on the ground that in a criminal proceeding the attendance of the defendant was requisite so that disposed of that, and I told him at that time that I didn't think a pretrial conference would be of any value because I told him then that I intended to apply to the Circuit Court for a writ of prohibition or mandate if they intended to try to arraign the defendant three years after the return of the indictment.

Does your Honor follow the chronology there?

The Court: Yes.

Let me review it now. In December, 1941, December 30, 1941, the indictment was returned. The next day the defendant posted bond.

Mr. Rose: Within a day or two.

The Court: The defendant voluntarily appeared without [26] arrest and posted bond?

Mr. Rose: That is correct. I was not his attorney at the time. I am glad he informed me. He said that a warrant was issued on the date of the return of that indictment.

The Court: A warrant was issued?

Mr. Rose: Yes.

The Court: Was it ever served?

Mr. Rose: Yes. He was brought up here in the marshal's office and a bond posted, as he informed me.

(Addressing the defendant): Is that correct?

The Defendant: Yes.

Mr. Tolin: What actually happened, I think, is this——

Mr. Rose: I didn't know, your Honor.

Mr. Tolin: That usually happens with people who have some responsibility in the community. When a true bill is returned and there is a warrant, they are telephoned and let know about it and they come in and surrender voluntarily. That is what he did, so there was a technical arrest in the office of the marshal, and he brought his bondsman with him when he came in so it was all taken care of in one transaction.

Mr. Rose: Mr. Tolin, I am informed by Mr. Danziger that that very fine custom was not practiced in that case. The marshal actually went down there and picked him up at the office. [27]

The Court: Anyhow, in a day or two the defendant was informed of the indictment against him by his arrest?

Mr. Rose: That is correct.

The Court: And he posted bail?

Mr. Rose: That is correct.

The Court: Nothing was then done for three years until November, 1944, at which time he was arraigned?

Mr. Rose: He was informed that he would be arraigned on the date that appears in that record.

The Court: Very well. He was arraigned, and on that date he made a motion to dismiss for want of prosecution?

Mr. Rose: That is correct.

The Court: He did not file a motion to quash?

Mr. Rose: Yes, the nomenclature used in my motion was to quash and to dismiss. If you will note the nomenclature——

The Court: In other words, you only filed one motion?

Mr. Rose: That is correct.

The Court: And that is the motion which appears at page 68 and 69 of your printed record?

Mr. Rose: Before Judge Harrison.

The Court: That motion was denied, he pleaded not guilty, it was transferred to Judge McCormick for setting on December 18, at which time Judge McCormick set it for trial on January 16, and on January 6 a conference was called, at [28] which time the defendant did not respond, or in any event at which time he did not appear, and the court announced the trial would proceed on January 16?

Mr. Rose: That is correct.

The Court: The trial date was set for January 16, 1945, at 10:00 a.m., before Judge McColloch and the trial proceeded on that date before Judge McColloch?

Mr. Rose: That is correct. That is the order of procedure up to that date.

The Court: Then on January 16, which is the time that you are talking about now when the colloquy occurred where you waived a jury?

Mr. Rose: That is correct. Now what happened that morning was this—if you will bear with me—your Honor will note the proceedings that occurred on the 16th——

The Court: While the Clerk is looking for that, the summons and citation on the corporation was made returnable when?

Mr. Rose: On the 16th.

The Court: The arraignment was on the 16th?

Mr. Rose: That is correct.

Now there is another point, Judge Hall, that I would like you to have in mind, and that is after Judge Harrison denied my motion to quash I applied for a writ of prohibition or in the alternative mandate on the Circuit Court, which was not passed on until the 16th of January, at which time I was advised by telegram from Mr. O'Brien that they had denied it without comment. I want your Honor to know that I was waiting at that time for a ruling by the Circuit Court on my application for a mandate or, in the alternative, prohibition. Is that clear to your Honor?

The Court: Your grounds for mandate was that they had waited for three years to arraign?

Mr. Rose: And that they were denying him due process.

Now they denied it without comment, and what happened on the 16th in the morning was this:

Government counsel announced that there was on the calendar for that morning the arraignment of two co-defendants, two corporate defendants, and I advised the court I knew nothing about it, and there was no one there representing the corporation. Whereupon Judge McColloch said, "Very well, Mr. Rose, I will appoint you to represent these two corporations. I will enter a plea of not guilty in their behalf and," he said, "well, in view of the fact that Judge McCormick assigned this to this department, and I am an out-of-town judge," he says, "my present intention is to proceed, and you will represent the corporation."

The Court: Where is that in the record?

Mr. Rose: Right there. You have it right in front of you. [30]

The Court: I have 2000 pages of it here. You say it is on the 16th? I have the minutes of the 16th.

Mr. Rose: If your Honor will go to the proceedings of the 16th——

Mr. Tolin: He is referring to that portion of the record which commences at about page 387. The first reference to that inquiry is on line 5 of page 392.

Mr. Rose: It starts at page 387, and that gives the whole story.

The Court: I have it.

Mr. Rose: I know I called attention to the fact that I was awaiting word from the Ninth Circuit.

The Court: And that you got it?

Mr. Rose: Yes.

I don't want to interrupt you, but we get to the

morning session at page 379—that thing is in the afternoon.

The Court: Very well. I will get to it in a moment.

Mr. Rose: On the bottom of page 383 you will note what the judge says what this affidavit was and what the Circuit Court had not considered because it erroneously did go up as a part of the record.

The Court: Which affidavit are you now talking about?

Mr. Rose: The one filed on the morning of the 16th.

The Court: Where is that in the record? It is not in the printed record. [31]

Mr. Rose: No, it is in the Supreme Court record. I handed it to you. It was printed later.

Mr. Tolin: After the judgment was affirmed, counsel referred to a petition for rehearing and it was then sent up. It had been left out before?

Mr. Rose. That is right: In other words, the Circuit Court and yourself knew nothing about the affidavit I was talking about until after they had rendered their decision.

Mr. Tolin: It was brought to their attention——

Mr. Rose: Upon a petition for hearing.

Mr. Tolin: Yes.

Mr. Rose: That is right.

The Court: This affidavit was before the trial judge?

Mr. Rose: That is the one he is talking about, when he says it wasn't out of his own district. Do

you remember the place I called your attention to? That is what he is talking about at page 383, in the last paragraph.

The Court: I will get to that in a minute.

Mr. Rose: Has your Honor read page 383, the last paragraph?

The Court: Yes, I read from page 379 to page 394, the beginning of the trial.

Mr. Rose: Very well. Now, then, I want to call your attention to this, that when the judge made the statement that he was appointing me over my objection to represent these [32] corporations and he was very apprehensive about this whole business in view of the seriousness of the showing made in the affidavit for a continuance, and that if he was in his own bailiwick he wouldn't be confronted with the problem that he is down here, that he thinks he is going to make me go ahead, subject to matters developing at the trial, and recessed until the afternoon.

Now it occurred to me that the judge here, in all aspects, appeared to be very fair and reasonable. In other words, it was inconceivable in my mind how it would be possible to carry on along the plan that he indicated, namely, that he was starting tentatively waiting for later developments. If these important things became pertinent——

The Court: He said that in the morning. He did not say that in the afternoon after he was advised of the fact of the writ of prohibition.

Mr. Rose: I think he said the same thing in the

afternoon. You will note, your Honor, the statement, "If we are obligated to go to trial we will waive a jury."

The Court: Yes, I find that in the afternoon.

Mr. Rose: Yes. In other words, we were still discussing that business there about whether we were going ahead. And I said, "If we are obligated to, we will waive a jury." Then Mr. Lucas called me on that—and I don't like what is in the record here, and so there will be no confusion about [33] it—I told him that I used the word "obligated" and he ought to know and the court knew.

Now, then, my motion is this: You will note that if I have had——

The Court: Just a moment now. Let me get one point at a time there. At page 392, Mr. Lucas said: "I think we should at this time, if we are going to proceed without the jury, have the waiver of the jury properly signed by all concerned, if the court please.

"The Court: Let me make it plain. It makes no difference to me whether the trial is with or without a jury.

"Mr. Lucas: I think counsel wanted to proceed without a jury."

He was referring to you, was he not?

Mr. Rose: Apparently.

The Court: Continuing:

"I am perfectly willing to proceed without a jury and it is entirely up to the defendant. I want to get the government on record in that regard.

"Mr. Rose: I made it clear, your Honor, that we are prepared to try this case if we are obligated to try it without a jury. I don't think I want to supplement that by repeating what I have said before."

That is what was said in the morning.

Mr. Rose: Yes. [34]

The Court: "Mr. Lucas: You used the word "obligated."

"Mr. Rose: I have already gone on record as waiving trial by jury.

"Mr. Lucas: I think the local rules——

And then you go on and talk about the written order.

Mr. Rose: And I refused to have it signed for the court. Have you found that?

The Court: Yes. All you say, "I am perfectly willing to either sign or orally waive a trial by jury in behalf of the respective defendants, one of whom I appear for without direction of the court."

Mr. Rose: I made myself clear. The court has indicated that he is appointing me over objection to represent the two corporate defendants that had been arraigned that morning. He has indicated that he is very reluctant to go ahead in view of the seriousness made by that showing, which is the affidavit.

The Court: I understand.

Mr. Rose: Now, then, here is a situation: This is what I think is vital. In other words, if we went into court and intended to waive a jury I would not

have made any argument about refusing to have the corporations waive it because I called the court's attention to the fact that it is required of me to advise them of their constitutional rights, and having failed to do so I would not—but the situation as to [35] those corporations who were saddled upon me was no different than the other defendant, and your Honor will have to admit, as a lawyer of long experience, those remarks of the court about fees, in his own place he would know how to take care of it, in view of this thing he is going ahead with apprehension, subject to later developments, how could you—wouldn't you rationally and properly reach the conclusion, well, in view of this situation it is impossible to proceed along the lines outlined by the judge with a jury so there is only one thing to do, since the judge appears at that stage of the case to be inclined to give us all of the legal rights, depositions, and so forth, how can that be done with a jury? We were at a state of war at that time, the properties involved here were situated in Trinidad, British West Indies, they had a branch office in London, the principal witnesses and the evidence were in Canada, London, Trinidad——

The Court: Did you ever at any time during the trial ask for an adjournment in order to take the depositions?

Mr. Rose: I tried to canvass the judicial mind and ask him what——

The Court: You are always trying to do—let me ask you—when a judge says that, that is why

I have got something here before you that strikes at the very vitals of it—answer me this question——

Mr. Rose: I said, what would you like to hear? He said, I am answering no questions.

The Court: Did you ever ask him subsequently for permission to take the depositions of any of the parties or secure any evidence from any of the places you mentioned in your affidavit that you filed on the morning of the 16th?

Mr. Rose: I have to answer that "No." What I am telling you is that I was endeavoring to find out what he would like to hear, what his reaction was, and he said that he is answering no questions.

The Court: It looks to me like you were sort of taking a risk, that you were willingly taking a chance, that your client might get acquitted by a trial by the jury.

Mr. Rose: Frankly, your Honor, the way the judge went along there throughout the government's case, to my great chagrin, it went just the opposite. He seemed to act and support their phase of the case as if he were highly in favor and sympathetic toward myself because that——

The Court: You have been around the courts too long to take any such conduct or attitude as any indication of a binding conclusion.

Mr. Rose: After this experience the answer is "Yes." But I was still hopeful at that stage of my career. In other words, your Honor, it was one of these things—now, I don't know; I may be all wet on this thing—but here is a [37] situation where a case is being tried to the court and it develops now

that I know what he had in his mind, it seems to me, in view of the observations that he made in the beginning when the government rested, he said, Mr. Rose, are you prepared to meet all of the issues presented by the government?

The Court: We are still talking about this waiver of jury, now.

Mr. Rose: The waiver of jury was induced by that remark that he was going ahead tentatively on two bases, one on the absence of defense witnesses and evidence, that is not available, and, secondly, on a prejudice that might ensue to Danziger by reason of my representing the two corporations who were saddled in my neck.

The Court: On this one point, the whole question is whether or not your client and you intelligently waived a jury.

Mr. Rose: That is the point. I say we did not.

The Court: What the Supreme Court said is that a waiver of a jury not intelligently made—I do not know what they mean by that, I am not sure that they do, as a matter of fact, but that is what they say, that that is when a person loses his right. Now what do you have here? You have a defendant who has a lawyer. I mean, he is not some backwoods person who has been picked up here by a couple of deputy [38] marshals or policemen and put in jail and misled as to his rights; he is a man of experience, he has as counsel a veteran of very many battles, an astute lawyer, to wit, A. Brigham Rose. It is pretty hard to convince me that the waiver of the jury was not intelligently made and

knowingly made, and made with a full right, because Mr. Lucas says, "We will go ahead and try it with a jury," and the judge says, "I don't care to try it with a jury," and then you say, "I will waive a jury."

Mr. Rose: If we are obligated to go ahead.

The Court: If we are obligated to.

Mr. Rose: And what interjected that? Why, if I wanted to go in there and try that case to the court, would I balk at waiving for the corporate defendants? In other words, when we speak of intelligence—you are quite correct, and I agree with your Honor's observation on exactly what the court has in mind when it says "willful and intelligent." Now intelligence, as I view it, as applicable to that matter, means: Are you doing that with any reservation? Are you doing it because you want to without question? Do you prefer it? Or are you doing it because of something that has taken place?

Now it would be just like when a judge comes in there and he says: Here, I make a showing there that he admits his ground for a continuance. The only excuse he offers is that Judge McCormick assigned it to him. He says, I would be able [39] to meet this situation very easily if I were in my district. Now we are going to require you to represent the defendants that you don't want to represent, and I have misgivings on the effect this is going to have to your client in view of the showing you have made here for a continuance, but let's go ahead. We can't tell in advance what is going to develop.

Now what was I to do in that situation? I told Danziger—that is my point—I said, "You cannot separate a jury if you want to take depositions in London or Trinidad, under the remarks of the trial judge there is no choice, and you have to waive a jury, and that is the situation."

Now whether that was intelligent or not, I don't know, but I am assuring you—and I am not speaking with my tongue in my cheek—that if it hadn't been for those particular exigencies, that forcing me to represent two defendants whose acts would place me in a position where it might be binding on them and would be binding on Danziger, I couldn't show partisanship, and then he said, well, we can only tell as this develops, whether you will require the witnesses, the defense, and all that.

Now under those circumstances can your Honor recognize what was the matter that persuaded me to advise Mr. Danziger, in the light of this unusual circumstance, to waive, if it was my intention to waive without qualification, why did I when the question came up to waive for the other defendants? [40] And why do I use the word "obligated"? In other words, this isn't a case where somebody comes in and says, we will try this case to the jury and then they find there has been an adverse ruling and then they come in later and say, we made a mistake in waiving a jury. In that case I agree with the court. If they knew what they were doing and nothing took place and they come in and waive, that is a waiver, they can't blow hot and cold, but

here you have an unprecedented situation. You have two defendants brought in in the morning——

The Court: I know, but let us go back here a moment to what you say was going through your mind when you advised Mr. Danziger to waive the jury, that you thought you were going to take depositions in Trinidad and London——

Mr. Rose: Correct.

The Court: ——and that you could not separate a jury.

Mr. Rose: I don't think you can.

The Court: I don't think you can either. But who suffers by the separation of the jury? It is not the defendant because as soon as the jury is separated, what happens? The defendant gets up and, I am sure, the defendant's counsel in this case would have done so, and moves for a mistrial and the judge would have had to have granted it. So you could not have suffered.

Mr. Rose: No, there are some authorities where reasonable [41] separation has been allowed.

The Court: There may be a reasonable separation, but if you are going to separate while in Trinidad or London I think that is a different situation.

Mr. Rose: Here is your situation here—then, for example, with those corporations he starts in receiving files wholesale. I said, "Wait until I look at it and make an objection."

He said, "They are all going in. You can make your objection later."

The Court: Counsel, here is the difficulty: I am not sitting here to say that Judge McColloch did

right or wrong. I am not sitting here to say that I would have done the same thing. I am not sitting here even as a reviewing court on appeal might sit in the acts of Judge McColloch. The only thing that I can determine is whether or not the acts of the trial judge were such, were so far wrong as to deprive this defendant of his constitutional right on that one point of a trial by jury. I am not sitting here as to whether he forced you to waive a trial by jury.

Mr. Rose: He didn't force me.

The Court: He could have forced you to a trial that day and you could have still have had your trial by jury.

Mr. Rose: What good would it have been?

The Court: That was up to you to decide at that time. [42] You certainly cannot say, well, what good is it and now come in——

Mr. Rose: Take a trial by jury and then jump up and say, this evidence against this corporation is embarrassing to me. I want to withdraw. I never heard of such a thing. He admitted he wasn't familiar with these proceedings and it was manifest to a point of demonstration.

The Court: You say, what good would it have done? You are now saying that that is what you wanted.

Mr. Rose: I say this, that in the face of this showing we should have had a continuance, we should not have been placed in the position of going to trial that morning or that afternoon.

The Court: If that were error it is not the kind of error which can be reached by a writ of habeas corpus.

Mr. Rose: Yes, it is. It is a denial of the due process clause which permits a witness to have defendants in his own behalf.

The Court: It cannot be reached by a writ of habeas corpus where the same point has already been passed on on appeal.

Mr. Rose: I call your attention to the fact that the Circuit Court had never seen that affidavit at the time that they passed on this appeal. That is why I have printed it for the Supreme Court. It was never a part of their record. [43]

The Court: Did the Supreme Court pass on it?

Mr. Rose: The denial of certiorari?

The Court: Yes.

Mr. Rose: Is that passing on it?

The Court: They denied it, did they not?

Mr. Rose: They denied every writ in a criminal case that came up during the summer session on the first call of the October term. What I was getting at, you made a remark that habeas corpus was not——

The Court: Counsel, you were just about to convince me of something here, and that was, that your point is not that you were denied a trial by jury but that you were denied due process in forcing you to trial when you had good grounds for a continuance.

Mr. Rose: And if I had any idea, in other words, having forced me in the face of good

grounds for a continuance to go to trial with the holding out of the olive branch that if it develops—do I make my point clear—if depositions are necessary we can work that out, I said, well, the only thing we can ever work out is to waive a jury.

The Court: Work out what?

Mr. Rose: To take depositions of witnesses and vital evidence.

The Court: Let me ask you this——

Mr. Rose: In other words, he didn't say when he denied [44] my continuance, for example, does the government want to stipulate what these witnesses will testify to, if they had said "Yes" that would have ended it.

The Court: Did he say that?

Mr. Rose: I said, if he had.

The Court: Did you ask him to stipulate?

Mr. Rose: The judge made the remark that you will note in the record, that with considerable apprehension he believes he is going to ask me to go ahead subject to later developments.

The Court: I am not talking about that now. Did you ask government counsel at any time during the trial to stipulate what these witnesses would say if they were present?

Mr. Rose: No.

The Court: Did you ever file any affidavit or statement or motion wherein you outlined what you expected them to testify to if they were present?

Mr. Rose: Other than what is in there.

The Court: Other than this affidavit?

Mr. Rose: No, that was the extent of it.

The Court: And you never did anything more?

Mr. Rose: I think you will find that pretty elaborate, names of witnesses, what they would testify to, the subject, the place, and everything else. Has your Honor read that yet?

The Court: Do you maintain that if they had been present [45] and testified to what you said here that it would have produced or might have produced a different result?

Mr. Rose: It would have been bound to. Now, look, Judge, for example, I thought he was being facetious when he made that comment about a typographical error. He had a winning way about him. He smiled and I thought he was cracking a little joke, but in the light of later developments I am convinced to a point of demonstration from his remarks that he was convinced that this defendant was a downright crook and that this enterprise, that the stock that was involved in it was not only nebulous but it was an out and out fraud. Now my point was this, your Honor: We were prepared to establish beyond any question of a doubt that $7,000,000 in American money had found its way into that enterprise, that they had oil-producing wells and geologists——

The Court: Just a moment. I have another court matter, counsel.

(Other court matters.)

The Court: Excuse me, counsel. You were saying something about an olive branch or something.

Mr. Rose: Well, for example, your Honor, what I was getting at is this: Mr. Danziger, as you realize—here is the situation—for example, as I look back now, here is an out-of-town judge and the minute he heard that Danziger was an executive vice president and associate of the old man [46] Doheny he flushed up there and his attitude changed immediately.

Now what I had in mind was this: The judge, from his remarks, from that salvo that found its way later in the record apparently was harboring in his own heart and mind a belief that here was a tinhorn chiseler who was out here interested in swindling a bunch of old women out of a few dollars. He didn't realize that Mr. Danziger had been connected with some of the biggest oil enterprises that this country has ever known, and that he was a legitimate oil man and was a member of the bar for over 40 years.

The Court: I cannot look into the judge's mind as to what he thought.

Mr. Rose: That is why I say that we now know what was in his mind.

The Court: But that was said after.

Mr. Rose: It is a confession. How do you know that happened in the jury room until after they come in with the verdict? They then come in and say, "I said so-and-so," "I didn't like this fellow's antecedents," and everything else. That is the only time I ever find out. The point is——

The Court: Just a moment. That statement which you attribute to the judge as though he proceeded as if there had been a plea of guilty was made by the judge after the judgment of guilty, was it not? [47]

Mr. Rose: After rendition of the verdict, the same as you would find out what happened in a jury room where the jurors, some of them, get up there and say, "I will hang any judge that is ever brought to trial before me," and four or five will say "Amen." You would never know that until the verdict was returned, isn't that right? It is the same thing here. This didn't occur six months later, it occurred relatively within a couple of days. That makes sense now in the light of certain things. In other words, I may be haywire on this but if I came to trial before you, Judge, and you would have made the remarks that he did, saying, "Well, this is a serious showing here for a continuance," after all I think all of this, in view of the charges in the indictment and the seriousness of these charges, here is a lawyer, and all that, and I have been forced to trial, you would say, "I got my calendar fixed up now, I have taken this time out, and we will go ahead." Now if it appears later that you are not given an opportunity to put on a defense and show the things that are vital here, that matter can probably be handled later.

All right. Now if you said that there wouldn't be anything improper about it. I had waived the jury. I would figure later on when the government

rested or got close to it that I would say, "Mr. Justice Hall, you know what we are prepared to show, we have made a presentation, and all that, I am not clairvoyant, I can't come to any conclusion as to what parts of the government's case you require that we offer proof against," etc., I wouldn't expect you to say, "Well, I want this particular proof of that," but I would expect you to say, "Well, I am interested in the bona fides of this company, I am interested in the question whether there were shareholders——"

The Court: Is that not up to the lawyer to say that he would like an opportunity to make a showing?

Mr. Rose: How can I tell when you are sitting back there?

The Court: You are not supposed to tell. You are complaining here now that you say that the judge formed his mind during the course of the trial and you are complaining now——

Mr. Rose: I didn't know it then.

The Court: Not that he made up his mind during the course of the trial and before the judgment, but he made up his mind the other way.

Mr. Rose: But how were we to know it? We know it now. We have his confession.

The Court: Now you say the reason why you are injured is because you thought he had his mind made up your way.

Mr. Rose: No, I say now it becomes important to show, one, that when he denied us due process

in the manner he did by refusing the continuance, then he held out an encouragement [49] to us that if we go ahead he is going to wait to see what develops during the trial, and then of course——

The Court: Why did you not ask him at the conclusion of the government's case to recess?

Mr. Rose: I asked him. I said, "What would you like to hear?"

The Court: At the conclusion of the government's case.

Mr. Rose: Yes. I asked him what he would like to hear and I called his attention to the fact that we had been prejudiced by the denial of a continuance, but I never got anything out of him except one answer, "I am not answering any questions." That was all. I called his attention notwithstanding the government——

The Court: You, as a lawyer, know that there is a way to frame your request to compel a judge to answer questions, to wit, by motions upon which he must act, either grant or deny, and yet—did you make a motion for a continuance?

Mr. Rose: You mean after the government rested?

The Court: Yes.

Mr. Rose: I called his attention to the dilemma we were in in view of the matters I set up in my application for a continuance and waited for him to say something. Now you know, Judge, there is no such thing as a motion for a continuance after the government rests. There is no such thing.

The Court: Oh, yes there is. [50]

Mr. Rose: You mean for the production of witnesses?

The Court: Yes. That was a case of a trial by the judge without a jury.

Mr. Rose: That is the point. You mean the judge has the power?

The Court: You said you were proceeding without a jury now because, you say, "Well, the judge is going along with me and I think he is going to be all right, and if something develops and I need time to get witnesses, I can get it," and when your time came to ask for it you did not ask for time.

Mr. Rose: How do you know what he is thinking about?

The Court: Put it in the form of a motion, just like you have a petition for a writ of habeas corpus. I do not like to answer questions but I am going to have to answer a petition.

Mr. Rose: In other words, when I said to him, "Well, we have been placed in a very odd and precarious position here in view of the fact that your Honor has forced us to go ahead here after the matters that I presented here in my application for a continuance," and I called his attention to certain other matters, and then I say, "May I have some expression from your Honor in respect to what you expect of the defense," and he said, "I am answering no question," what do you think I should have done? Your Honor is overlooking a very important psychological thing that you yourself have [51]

personally experienced, and that is this, that when the government rested its case at that time no more than I do at this time I didn't think the government had made out a semblance of a case.

The Court: You made a motion for judgment of acquittal or dismissal?

Mr. Rose: Yes. He took them all under advisement.

The Court: Then you did not move for a continuance?

Mr. Rose: No. He took it under advisement. He took various of those motions under advisement. He even took the motion to quash under submission.

The Court: We will have a short recess. There is a judges' meeting that I have to attend in a few minutes.

(Short recess.)

The Court: Mr. Rose, I wonder if we could get to that other point, the one that I expressed some concern about, as to whether or not there had been a waiver of the defendants' right to challenge the grand jury, or did you have some particular matter with relation to the point that we had been discussing?

Mr. Rose: Well, what I had in mind, your Honor, is this—I am not saying this from the standpoint of trying to give particular color to this particular case—but I would like to give your Honor my reaction of the overall picture here, and that is this:—— [52]

The Court: Why not save that until after you give me the point on the other matter?

Mr. Rose: Very well.

The Court: Because I am particularly concerned about that. I have your motion here.

Mr. Rose: Frankly, your Honor, I was very enthusiastic about the holding in the Ballard case and in the Theil case until I read that opinion of yours in that Local 36 case, and I will go on record right now that I agreed with your observations, and my admiration for your Honor's spirit in this field increased when I read your views of those two cases. Of course I was a little disheartened personally because I considered that a very important case here.

Now as I view the position of Mr. Tolin, and I am not saying this critically because I will say this for Mr. Tolin, he has been the most courteous man I have ever run into representing the government in a criminal case up to the present time.

The Court: He has a very disarming effect, particularly as a prosecutor, I might say.

Mr. Rose: I remember up in the Circuit Court Justice Denman struck his brief and I was very elated—that was on his own motion; I thought that was it—and Mr. Justice Denman said, "Not speaking for my associates, Mr. Tolin, I would like you to at least for my education tell me what this [53] conspiracy is about, or who the conspirators are, etc." I would like to know, but I have never gotten the answer to that yet. That is why I raise it here in my brief.

Now here is my position: As your Honor knows,

the Ballard case had not come down at the time that I perfected this appeal and presented my briefs to the Circuit Court. Your Honor is mindful of that.

The Court: I have the dates here.

Mr. Tolin: Mr. Tolin admits that. [54]

* * *

The Court: Counsel, I do not think there is any doubt but what your challenge to the grand jury on the ground that women were systematically excluded is a good and valid challenge if you did not waive it, and the whole question in this case is whether or not you waived it.

Now what my private opinions might be about the holding of the Supreme Court in the Ballard case—I mean whether or not it was waived—or whether or not in every case that is tried somebody must repeat all of the grounds of invalidity which the Supreme Court has said for 130 years are no good, that is immaterial. In the Ballard case the basis of their decision was that it had not been waived and I have the file here, and they specifically raise the question of the exclusion of the women in the Ballard case. [58]

* * *

The Court: The second time they said he did not waive it. So the whole point on this is whether or not you waived it. In searching the record I do not find any place where you specifically raised that point, that is, that the grand jury, the selection of the grand jury, the manner and method of choosing, was void because it excluded women, unless by your

statement which appears on page 178 of the printed record, your general statement that you move to quash it on the ground that it was contrary to the laws of the United States and in violation of the Constitution.

* * *

The Court: Now the question is whether or not that saves the record for you. The Circuit Court of Appeals said it did not. [60]

Mr. Rose: No, they didn't pass on that point at all.

The Court: They denied your petition for rehearing.

Mr. Rose: I have some authorities that that doesn't mean anything. The point raised for the first time after decision—that is the new memorandum I gave you this afternoon.

The Court: Yes, I noticed that.

Mr. Rose: They are not obligated to reconsider that thing at all. If they had issued a memorandum opinion to the effect that we have considered the new points presented on rehearing and we do not believe they have any merit or anything, but under the authorities and Mr. O'Brien's statement there on his procedure—and I have checked Corpus Juris Secundum pretty carefully on that—a petition for rehearing places the petitioner in the position that if a point was available to him and he didn't raise it, their granting of a rehearing didn't mean anything at all. It is just like the Supreme Court denying a hearing after a decision of the District Court.

The Court: I know, but if the point was in the record——

Mr. Rose: I think it is.

The Court: Just a moment. If the point was in the record in the Ballard case the Circuit Court did not notice it the first time, nor the Supreme Court the first time, nor the Circuit Court the second time. [61]

Mr. Rose: The Supreme Court noticed it for the first time in the second one. They said they could take notice of it for the first time.

The Court: That was not on a petition for rehearing. In the Zapp case it was a petition for a rehearing.

Mr. Rose: Second petition for rehearing.

The Court: If you raised this in this record then the Circuit had it before them on a petition for rehearing and it was not a new point.

Mr. Rose: Except that here is what happened in the Zapp case, your Honor. The first petition for certiorari to the Supreme Court went up on unlawful search and seizure, as you will remember. That was the point.

The Court: I know that.

Mr. Rose: This point wasn't even dreamed about in that case.

The Court: It was dreamed about.

Mr. Rose: Well, it wasn't raised then.

The Court: It was in the record.

Mr. Rose: Now the second time they petition for rehearing the Supreme Court denied it. The

third application was to vacate the order denying the rehearing and the original certiorari and they for the first time took judicial notice of that. That is all they say. But that petition for rehearing, as I understand it, unless I am badly mistaken, did not go up there on that ground, your Honor.

The Court: In the Supreme Court it did.

Mr. Rose: I don't think so, your Honor.

Mr. Tolin: The Zapp case?

Mr. Rose: Yes.

Mr. Tolin: In the Zapp case the Supreme Court denied petition for rehearing on still another ground, and thereafter counsel made a motion to recall the mandate on this ground, referring in that motion to the Ballard case.

The Court: And the fact that he had preserved his point.

Mr. Tolin: Yes, and that motion was granted.

The Court: Now here is a case decided February 9th by the Supreme Court on this question about whether or not one waives a constitutional right. I do not suppose that either of you had noticed it in connection with this matter, and I would not have except that I, in reading this, noticed that point. The case is Musser, et al., v. Utah. That is the polygamy case in Utah.

In that case the court said:

"The appellant sought review by this court of a decision by the Supreme Court of Utah on the ground that the State convicted them in violation of the Fourteenth Amendment to the Federal Con-

stitution. In the trial court a motion to dismiss the charge at the close of the evidence broadly indicated reliance [63] on the Fourteenth as well as the First Amendments and such reliance was indicated in request for instructions. A preliminary motion to quash the information was stated in broad terms, which it is claimed admitted argument of any Federal grounds. The trial resulted in conviction and the Supreme Court of the state overruled all constitutional objections and affirmed it on argument in this court inquiries from the bench suggested a Federal question which had not been specifically assigned by defendants in this court, nor in any court below, although general transgression of the Fourteenth Amendment had been alleged."

And they went on to hold that they had raised the question.

Now if the general question of the violation of the defendant's rights in the Federal Constitution was raised in the motion to dismiss and quash, and if thereafter the Supreme Court decided a case contrary to the manner which everybody had deemed the law to be under previous declarations of the Supreme Court, the question arises in my mind whether or not the defendant actually waived it.

In other words, did he preserve his rights under the Ballard case by simply saying that this is a violation of the Constitution of the United States?

Mr. Tolin: Of course his language in the Ballard case doesn't just say that. In the same sen-

tence it goes on and specifies exactly what constitutional right is violated.

The Court: But here in the Musser case they say differently. I do not have this record. It may be, Mr. Tolin, that you can get it—I do not know that the Attorney General's office was even in the matter—but you might get the record there to see just the nature and the language of their motion to dismiss.

Of course this goes back to the State for them to determine whether or not their statute is in violation of the Constitution.

Mr. Rose: Of course that has always been a hot question, Utah, as your Honor realizes. In other words, the Latter Day Saints Church has never confessed that polygamy is unconstitutional nor have they ever conceded that the government of the United States had the right to control their freedom of religious doctrine.

The Court: They talk here about exercising the right of free speech protected by the First and Fourteenth Amendments, while you said the Fifth Amendment, due process, and the Sixth Amendment, you mention those in your statement.

Mr. Tolin: Of course the Ninth Circuit has had occasion to pass upon exactly this point in the Redman case.

Mr. Rose: Your Honor, I disagree with Mr. Tolin's [65] analysis of that case. I would like your Honor to analyze that case.

There is a fellow that went up in propria per-

sona, there was no appearance, and I for one agree with that court in this, I had that thing arise in that famous case that I handled on habeas corpus, in re Leach and Huggins.

Now, your Honor, in that case—and I think Mr. Tolin, in principle, will agree with me—all that case holds is that every man who has been convicted for the last 25 or 40 years can't come out with an application for a writ of habeas corpus and say, "The Ballard case says that the grand jury was no good and therefore I am entitled to have my conviction nullified."

In other words, in that case there was no motion to quash the indictment of any character, and I agree with the Circuit definitely on their holding in that matter. In other words, they claim that a man convicted who has not raised any objection or made any motion to quash, in the light of the Ballard case can't come out and say, "Here, turn me loose because the Ballard case says the grand jury was illegally constituted."

That is the distinguishing point, and I don't think it is even worth arguing about.

The Court: I would like to make another observation. I was under the impression when I first began to study this [66] case that that point might fall within the general rule that the sufficiency of an indictment can be raised at any time, but the difficulty with applying that rule to this proposition is that the courts hold that an attack upon the method of selection of the grand jury is not an

attack upon the face of the indictment, and that it is an attack upon procedure which must be made within certain times and cannot, like the other points, be raised at any time before final judgment. At first I was inclined to think that you, having raised it before the mandate came down here, might have raised it in time. But I have since changed my mind on that and now the whole question in my mind is whether or not you raised it or waived it.

* * *

Los Angeles, California, March 2, 1948
2 o'Clock P.M.

The Court: Very well. The Danziger matter. Mr. Rose?

Mr. Rose: I believe yesterday at the time of adjournment we were addressing out consideration to the question as to whether the form of objection raised in the motion to quash the indictment by reason of the nomenclature therein employed was comprehensive enough to reach the point. In passing, as my thoughts take hold here, it occurs to me, first, that your Honor must keep in mind under the supplemental memorandum that I handed to your Honor yesterday the authorities are quite vivid and clear that points raised on the petition for rehearing usually are rejected by the court for no other reason than that they weren't raised at the time of argument and in briefs.

Now it is conceded—it is not subject to controversy here—that the applicability of the holding in

the Ballard and Theil cases was not presented to the Circuit Court.

The Court: What is that?

Mr. Rose: The application.

The Court: It was on a petition for a rehearing.

Mr. Rose: Until the petition for rehearing. In other words, after they had decided the case. But under these authorities that I presented, and in view of the fact that the Circuit made no comment, it will be assumed that they acted [72] in conformity with a line of authorities that I have presented here yesterday and then the memorandum —not that I hold Mr. O'Brien out as an authority binding upon your Honor, but he is in that Circuit.

The Court: His reputation as a sort of a walking university.

Mr. Rose: Especially as to rules and procedural matters in that particular Circuit.

Now I quote from the manual here and point out that they will not consider it. We therefore are confronted with a factual situation here that would be different if the Circuit would have even written a 2-line memorandum, we have considered the matters presented on petition for rehearing and we are inclined to the view that our original opinion is still the judgment of this court, if they even resorted to that you might say, although I take the view, your Honor, that a court having jurisdiction in habeas corpus matters—and I have had a tremendous experience in that field—that the opinions of any court in the land are immaterial and ir-

relevant, as I pointed out in that Johnson case, where it says that the court having jurisdiction over the writ should examine the record and satisfy himself, the Circuit and any other court notwithstanding.

I used to be confronted here with a Superior Court judge who would commit me for contempt and I couldn't get but only [73] about one or two of the local Superior Court judges that would ever entertain an application for a writ. They said that he was a brother judge. Well, I went up to Judge Conway and he said, "You go back there and tell them the mandate of the statute requires them to issue the writ and to hear it and decide it, whether it is a brother judge or otherwise." He said, "You know about that $5000 penalty, don't you?"

I said, "Yes."

"Well," he said, "call their attention to it."

The Court: I issued a writ for you.

Mr. Rose: I know, but the scope of habeas corpus now has been amplified extensively. I don't know whether your Honor has had occasion to consider this case for yourself, that civil case——

The Court: Which one?

Mr. Rose: Sunel v. Large.

The Court: I do not remember.

Mr. Rose: It is in 91 U. S. Supreme Court, Law Edition Advance Opinion, Volume 17. You have those of course in your chambers?

The Court: I have those at home. I have the U. S. Reports.

Mr. Rose: May I leave this with your Honor? It is a very illuminating case and it is by far the most exhaustive [74] treatise on a review of the attempted past limitations on the field of habeas corpus and it is very comforting to note the trend in respect to the latitude that should be resorted to in habeas corpus as reflected in both the main and dissenting opinions there.

To get back to this motion to quash. Your Honor should first consider, it appears to me, this: Was the composition of the grand jury that indicted Danziger a body that could have been remedied if a motion had been made that he had been arraigned as required by the statute promptly, could that in the light—by the way, in that Sunel case they speak about something which your Honor commented on yesterday afternoon, about the law crystallizing and later, after an event has occurred——

The Court: That is the turning point of the decision.

Mr. Rose: Yes. In other words, that is my point.

Now they comment on that and I think they present it in a manner that would be more illuminating to your Honor than my attempt to expound on it.

Now as I say, your Honor, here the numerous incredible and unusual events all seem to revolve and transgress each other and it becomes a sort

of an endless case. For example, take the question of a timely motion to quash in this case. He hasn't been arraigned, as your Honor knows, now for almost three years and if my memory serves me there must have been [75] at least six different grand juries formulated within the interval of the return of his indictment and his arraignment, so termed. So we are not confronted with a situation here where it may be urged by opposing counsel, well, if he had made his objection timely to the indictment why we could have remedied it or rectified it because from a standpoint of pragmatism it must be conceded that that could not be done here. It was water over the dam six times. There had been six grand juries impaneled during that interval. Therefore it wouldn't have made a particle of difference.

So I say that the first available opportunity after I was attempting to protect the legal and constitutional entitlements of the defendant in attempting to secure for him due process and attacking the manifest denial of due process to him, and then being forced to trial as I was, I raised that objection at the first opportunity that I could raise it. In other words, there was something for me to put my teeth into at that time. It hadn't existed before.

The Court: You mean after the Ballard case was decided?

Mr. Rose: No, the Ballard case had not been decided.

The Court: I say, that was after that, on your petition for rehearing, that is the first time?

Mr. Rose: No, your Honor. That isn't exactly what I have in mind. I have in mind that I developed in the cross-examination during the government's case that the indictment [76] had been procured on absolute hearsay evidence and I canvassed that thing and developed it.

I will say this for Judge McColloch, he didn't reject that on account of its untimeliness. That was the only argument made by Mr. Lucas.

The Court: You just said a moment ago that that was the first time I could raise the question, and I thought you were talking about that that was the first time you could raise the question concerning the method of impaneling the grand jury.

Mr. Rose: That is true.

The Court: When was that?

Mr. Rose: On the petition for rehearing. But I mean the other aspect that Mr. Tolin—he tries to place a narrow construction on it——

The Court: He has not had much of a chance to say anything yet.

Mr. Rose: He has got it in here. He has resorted at considerable length to urge the proposition that he doesn't like that broad language that I used in the ultimate objection, the motion to quash. He claims I was addressing this motion solely and distinctly to the hearsay phase. But I say that an analysis of my objection cannot be so narrowly construed. That is the thing that generated the motion to quash, and while I was at it I, from experience, enlarged on [77] my objection to embrace

everything that could have been embraced and my application was addressed to your Honor in the motion to quash the indictment upon the grounds that the same was procured contrary to the laws of the United States and in violation of the constitutional provisos, namely, due process, the equality protection of the law, and I add on about the hearsay.

Now, then, in that case that your Honor so graciously commented on, I had that copied today and I think, your Honor, that this places a very strong argument in favor of my position, and I thank the state that has been one of my nurturing places for coming forth with this helpful thing at this propitious time.

As your Honor pointed out, this decision embraces the very thing we are talking about here. In other words, there was some generation of a possible transgression of the Fourteenth Amendment, and then they state, after rehearing it convinces them that questions are inherent in this appeal which were not presented or considered by the Supreme Court of Utah. Then they comment that the trial here was not conducted in Federal Court, indicating that if it had been that point definitely, in the light of the dissent here, would definitely have struck a more forceful blow than it did in reviewing a case which they, under policy involving a state, usually remanded to the state court. [78]

Now in the dissent of Mr. Justice Rutledge, with whom Mr. Justice Douglas and Mr. Justice Murphy concur, said that he would make a different disposi-

tion of the case. He then goes on to determine the case on its merits and winds up by saying that since therefore the conviction may rest on the ground of invalidity under the Federal Constitution, that he would reverse the judgment.

Now there are three of our outstanding protagonists in the highest court of the land here who go further and say, well, here is a point that we have raised ourselves. They haven't raised it. There has been a violation of a certain fundamental law guaranteed under the laws of the United States. We would take and reverse it. We wouldn't even bother about sending it back.

I think it is very comforting and I think it is at least an expression of the highest court on the very thing that we are giving consideration to here in this hearing.

Now, your Honor, did you read the Rodriguez case that I cited in my memorandum? Here is an expression of the United States Supreme Court, and in this case, your Honor, the grand jury was attacked first in a motion for an arrest of judgment. It says:

"The government, however, contends that the motion in arrest of judgment came too late and in support of that view cites Lang v. Gale." [79]

Then it goes on to say:

"But in the same case the court said, what is pertinent to the present discussion? There are cases undoubtedly which admit a different consideration and which the objection to the grand jury may be taken at any time. These are——"

The Court: What is the citation?

Mr. Rose: 49 L. Ed. 994. I have it in my memorandum here.

The Court: You do not have the United States citation?

Mr. Rose: I think I can find it.

The Court: Do not bother. I thought I would take a glance at the case now. Go ahead.

Mr. Rose: You see, this Rodriguez case which, incidentally, is some 41 years before the Ballard decision, it points out that their holding, and also the Gale case, the nomenclature that I cited from the Rodriguez case, that is, there are cases undoubtedly or where some other fundamental requisite has not been complied with, and they claim that that can be raised at any time.

So you have two United States Supreme Court decisions that indicate—of course we have to use this broad omnibus statement—in other words, where it hadn't been properly impaneled, where it is void or where some other fundamental requisite has not been complied with. [80]

The Court: In other words, your position is that that case holds that you can raise a constitutional question at any time unless you specifically waive it?

Mr. Rose: That is correct. And we don't have to go so far, your Honor, we don't have to hold that the Ballard and Theil cases are constitutionally fundamental violations. They claim that the jury was impaneled in violation of the laws of the United

States and the policy of the laws of the United States.

The Court: What law? The Constitution?

Mr. Rose: Well, let's see the exact nomenclature that they use here.

The Court: You do not need to bother. I have read it.

Mr. Rose: They say that Congress has provided that jurors in a Federal Court shall have the same qualifications as those of the highest court of the law in the state judicial code—and they cite the code—which provision applies to grand as well as petit jurors. In California and in most states women are eligible for jury service. So they conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that as in the Theil case they should exercise their power over the administration of justice in the Federal Courts to correct errors.

The Court: That is the basis of their decision the, is [81] it not, that they exercised their powers over the administration of justice in the Federal Court in this particular case?

Mr. Rose: No, because every time that matter has come up subsequently, like in the Bell case and the Zapp case, and such cases, they haven't even bothered about writing an opinion. You know that. They have merely referred to the Ballard case.

The Court: They did not do that in your case.

Mr. Rose: They didn't grant me a writ.

The Court: But you had it set forth in your petion for certiorari, did you not?

Mr. Rose: Well, your Honor, I am surprised—I don't know—your Honor knows that a lot better than I do, that it has been repeatedly held that the denial of an application of certiorari by the United States Supreme Court is not an affirmance, or an approval or anything else of the Circuit Court's opinion.

In other words, I can say this, that we didn't fare any worse than a couple of hundred at least other applications from all over the United States when that October term opened and vacation was over. All of at least 200 some-odd certiorari petitions were likewise denied, so we don't stand alone. That is why I got a lot of comfort from the form of the mandate which says it leaves it open to the condemned individual's rights as guaranteed by the laws of the United States [82] and the Constitution.

I claim that the holding in the Ballard case squarely meets the nomenclature in the Rodriguez and the Gale cases which say that where the whole proceeding of forming the panel is void, or has been selected by persons having no authority to select them—which is the case here—or where some other fundamental requisite has not been complied with.

Now it is quite true that the Rodriguez case and the Gale case do not say where they have excluded women, or anything else, but you cannot escape the fact that the Supreme Court says that

the grand jury can be attacked at any time when any of these matters are present. In other words, the Ballard case and the Theil case definitely hold that the grand jury that indicted Danziger was no good, that it had no power to indict him. They don't say that they had no power to indict Ballard, because, as one of the contentions, as I remember, that was raised in there was that that was a woman defendant. I think that was one of the issues that Mr. Justice Denman struggled with when that point was up in the Circuit. But the fact that they have used that as the solitary and sole basis for a dismissal of the indictment in the Zapp case and in the Bell case and in one other that I don't recall at the moment, with just that short and curt remark—the matter is remanded with direction to dismiss the indictment. Ballard v. United States—and that shows that they [83] are not applying, as your Honor suggests, that holding because they are trying to supervise what occurred in that particular case. I don't think that is what they had in mind at all.

Now as I said yesterday, I read with considerable interest your observation in the Local 36 case and I can see where your conclusion reached in that case was well grounded, but on the other hand we get down to fundamentals here. Why should Zapp, Ballard, Bell and other persons have their indictment quashed on that solitary and sole ground —and that is the only ground that has ever been advanced in those special cases—when here we have

an accumulation of a maze of proceedings that are so paradoxical to due process that it is inconceivable who one can examine this record and sincerely claim that the defendant, the petitioner herein, had a fair trial and due process. Everything has happened in this case. I don't know of a case in point and I don't think your Honor does. There has never been a case where so many things were wrong. Why in this case here the court received hundreds of documents without even giving me a chance to read them and make an objection. He said, they will go in and you can make your objection later. Then, by George, he admitted documentary evidence which may have been binding on the two corporate defendants who have come out of this——

The Court: You are not making that as one of your [84] points?

Mr. Rose: No. I claim the whole procedure was wrong.

The Court: You claim that everything the judge did was wrong, is that it, or almost everything?

Mr. Rose: Almost everything. Honestly I do, your Honor. And I say that with the utmost sincerity.

The Court: Very well.

Mr. Rose: I am not saying that critically because I know your Honor is not going to be impressed by my opinion about what a judge did or what he didn't do, but I say here—which, incidentally, while I am discussing this, your Honor,

I had this in mind yesterday—when the question came up about what happened, why I didn't make a motion at the end of the government's case for a continuance.

Now your Honor is a trial man of great experience and knows that lawyers are not infallible. They are victims sometimes of not their imagination but victims of what they observe take place in court. Now, for example, when the government rested its case, that was the first time—and if your Honor will read that record you will find that incredible dialogue between the trial court and Mr. Lucas—after the government had rested and after the judge told me, if you don't think that this man can take the stand and say he was the agent of Danziger, and I disagreed, and then he said to Mr. Lucas at the conclusion of the government's case, I have [85] had no experience in this form of charge. Now what are the elements of this offense? And Mr. Lucas said that the Securities Act violation charged in that indictment was identical with the mail fraud action.

Now your Honor knows that that isn't true. Then when I wanted to reply to it the judge said, "I will look into this for myself." Now it was my view as a lawyer——

The Court: What has that to do with whether or not you waived the point on the composition of the jury?

Mr. Rose: I didn't waive it when I made my motion to quash.

The Court: I said, what has that to do with whether you did or not?

Mr. Rose: I am simply showing—I was adverting back to what your Honor raised yesterday in regard to my motion.

The Court: But you did not make a motion at the end of the government's case.

Mr. Rose: In other words, I was satisfied in my own mind that the government had not established any semblance of a case, and I still am of that opinion.

The Court: Then you risked your judgment.

Mr. Rose: Wasn't that up to the judge in view of his remarks?

The Court: No, I do not think so.

Mr. Rose: Right now you and I know from what we have in [86] the record here that if I even had had Danziger here as a witness in that proceeding it wouldn't have made a bit of difference with that particular judge.

The Court: I do not know that.

Mr. Rose: He said so right there. It is in the record. He had reached a definite opinion and was proceeding as if the defendant had pleaded guilty and he didn't understand why I was wasting time in even putting on a defense. So we have so much for that on the subject of whether that point was reserved.

Now we get into another significant and important point here, and that is the failure to arraign the defendant. Your Honor must keep in mind that

there is a statute which was applicable at the time of this indictment which required and made it mandatory when the defendant was arrested to take the defendant before the nearest commissioner or nearest judicial officer having jurisdiction. Now your Honor is familiar with the McNabb case and the Anderson case and all those cases which have arisen out of that particular statute.

To me, the case of United States v. Haupt, 136 F. (2d) 661, is the most persuasive authority because in this case they definitely hold that a defendant cannot waive arraignment. In this case the man signed a waiver of arraignment with the FBI. That is what he did here. And here is the nomenclature employed by the court: [87]

"How can it be said that one under arrest may waive the duties imposed by law upon the arresting officer? To so permit would mean that the duties of an arresting officer were dependent upon the action of the arrested person, rather than upon the action of Congress."

The Court: What is that case?

Mr. Rose: United States v. Haupt, H-a-u-p-t; 136 F. (2d) 661.

"In such case, the statutory requirement might be readily nullified merely by obtaining from the arrested person a so-called 'waiver of custody.' This would require consideration again of whether the waiver was voluntarily made and 'competently and intelligently' entered into."

Now that is exactly what I am getting at. The Circuit Court and Mr. Tolin have apparently missed

my point because surprisingly the author of this opinion, Mr. Justice Healy, in the case of Reynolds v. United States, 138 F. (2d) 346, says:

"The directive (he is talking about the necessity of arraignment) is not something which the officer is free to comply with or ignore according as he may think the exigencies of the situation demand. It is a fundamental right designed to safeguard the individual in the free land against [88] the arbitrary exercise of power."

Now both the Circuit Court apparently and our astute Mr. Tolin here have taken the view that because they cite certain cases that hold that after a defendant has appeared and he is accountable for the delay he cannot lay claim that he hasn't been afforded the speedy trial secured to him by the Constitution of the United States because in that case he himself has delayed it, although I question it, your Honor, and I think it is about time we got a ruling. I take the view, and the decisions that I have presented, some of them here I think properly interpreted would hold that in regard to procedure, such as arraignment and matters of that kind, the Federal Courts employ the practice prevalent in the jurisdiction.

Now I cited originally a couple of cases where the District Court of Appeals here dismissed an information because the judge stalled around—it was one of Mr. Lavine's cases—where the judge stalled around for two or three days, passed the 60-day limitation, saying that he had matters under

submission and that he was busy, and they ordered that information conviction set aside on the ground that there was no legal basis for that.

However, that law is definitely established here by our Supreme Court. It is incumbent upon the government to show a legitimate excuse for a delay past the 60 days. [89]

The Court: What is the statute?

Mr. Rose: 60 days.

The Court: For arraignment?

Mr. Rose: Immediately. Like ours. The language is the same.

The Court: The statute requires the defendant to be arraigned as soon as practicable.

Mr. Rose: It is practically the same as our Federal statute, which wasn't in existence at the time that some of these old cases cited by Mr. Tolin were tried. That statute was not in existence at one time. There are a line of old cases which invoke the common law, and of course there is a distinction. But here where the act of Congress requires that the arresting officer can't shift the burden of arraigning the defendant and bringing him before a magistrate or a judge promptly, he can't say, well, it is up to the defendant. They hold in this case that he can't even get a waiver of it.

The Court: The Circuit Court passed specifically on that point.

Mr. Rose: No, they didn't, your Honor.

The Court: That is the first paragraph of Judge

Healy's opinion when he gets down to it.

Mr. Rose: But they are confusing the matter of arraignment with the matter of an early trial. They were reviewing that affidavit. [90]

The Court: I do not know whether they were confused or not. That is not what they said.

Mr. Rose: Well, they can't blow hot and cold in that other decision that I just read, the same author of the opinion on the matter of arraignment said that as a directive it is not something which the officer is free to comply with or not.

The Court: Is that the Haupt case?

Mr. Rose: No, that Haupt case says that he can't even waive arraignment by writing. This is Mr. Justice Healy, with Judge Garrecht and Judge Stephens concurring, in a case entitled Runnell v. United States, where the man was arrested on June 24th and taken before a commissioner on July 14th. Now what happened here—I don't know whether it was due to my negligence or what it was due to—but I am satisfied that that Circuit Court opinion, because the authorities that were presented by the government in opposition to that point, had nothing to do with arraignment. They were all cases where the man had come in and made motions and made a demurrer, and so forth, and then they were out-of-state jurisdictions and not in this particular locale, and where there was a delay due to some action on the part of the defendant, and they say he can't claim it because he should have come in—that is what they all turn on—is this very

thing that I am about to announce. They say he should have come into court [91] and demanded it, that he get an early trial, but where you have not brought the defendant in and arraigned him and had him plead, this would be novel indeed that a defendant would walk into this court here, for example, and say, "Mr. Justice Hall, I was arrested here about a month ago——"

The Court: Or last week.

Mr. Rose: Yes—"and I want you to arraign me. I want to enter a plea here."

You turn to the Clerk and say, "Is this matter on the calendar," or something of that kind. But whoever contemplated, as this McNabb case says, as the Haupt case says and even the Runnell case, you don't pass the responsibility of the man that serves the warrant on to the accused and say that he is supposed to initiate the business of setting the matter of his arraignment on the calendar. That would be a novel thing indeed.

The Court: It does not appear to me that the Circuit Court by their language indicated that they were confused.

Mr. Rose: I read it over after your Honor made that comment, and I am satisfied that what happened was, during the oral argument there, your Honor, that point—there again I was thrown off—Mr. Justice Denman finally indicated that he was of the opinion that there had been a denial of due process in this case and asked the government to file a new brief. [92]

* * *

JACOB MORRIS DANZIGER

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Jacob Danziger.

The Clerk: Jacob Morris Danziger?

The Witness: Yes.

The Clerk: Take the stand.

Direct Examination

By Mr. Rose:

Q. Mr. Danziger, you are the petitioner in this case? A. I am.

Q. Now in respect to the proceedings had on January 16 of 1945 in Judge McColloch's case, do you recall being called upon in that connection to express your disposition to proceed by way of trial to the court or jury? A. I do.

Q. At the time that you entered the court on that date, January 16, 1945, was it your intention to waive trial by jury?

A. No, it was not, Mr. Rose. You and I had been discussing the matter from the time you first came into the case, which was a few days before I was ordered to be arraigned, and your advice to me was—and I agreed with it—that we [98] were to have a trial by jury.

Q. You know, as Mr. Justice Hall indicated yesterday——

The Court: Judge Hall, not Mr. Justice.

Mr. Rose: Very well.

(Testimony of Jacob Morris Danziger.)

Q. ——made reference to the record of a written waiver. Do you recall the circumstances under which that was signed? A. Yes, I do.

The Court: What were they?

The Witness: In the morning of that day the court said that he was inclined to deny a motion that we had pending for a continuance for the purpose of taking depositions. He said something about, "I am only stating it professionally now," and he went on to say that if it appears later in the case that the evidence is important to you—I don't know whether he used that exact language—he would grant a continuance, or what he said, but the import of what he said was that a motion for a continuance then would be in order, and during that recess at noon Mr. Rose said to me that under those circumstances you will never be safe in going to trial with a jury, and I agreed with him, as my own intelligence told me that it was an impossible thing to do, and he recommended, and I made up my mind, that I would waive the jury if the court made the ruling that he indicated in the morning that he was going to make. And that afternoon he did make that ruling affirmatively [99] and I then waived jury.

Q. (By Mr. Rose): Was it your impression at the time you waived the jury that the trial court was to make known what he required of us in respect to the evidence that we had presented in the application for a continuance?

(Testimony of Jacob Morris Danziger.)

Mr. Tolin: That is objected to on the ground it is incompetent, irrelevant and immaterial, calls for speculation, conjecture and surmise.

The Court: It is compound and complex. I do not understand the question. Will you reframe it?

Q. (By Mr. Rose): From the remarks made by the trial judge, what was your impression in regard to the necessity of waiving a trial by jury?

The Court: He just got through testifying to that.

Mr. Rose: Very well.

Q. Had you known that the disposition and the availability of the evidence which you presented as desirable in support of your evidence as contained in the affidavit that was presented to Judge McColloch that morning—would you read as far as I have gone, Mr. Reporter? I lost track of what I was saying.

The Court: You had better start over again.

Q. (By Mr. Rose): At the time that you waived trial by jury in the manner reflected by this record, were you of the opinion that in view of the remarks made by the trial judge that you would be afforded an opportunity to produce witnesses or get depositions before the trial was finally concluded?

A. Yes. I was of the opinion that if the court thought that the evidence was proper in the case that he would then grant a continuance. That is what I understood him to say in the language that he used.

(Testimony of Jacob Morris Danziger.)

Mr. Rose: You may inquire.

Cross-Examination

By Mr. Tolin:

Q. What is your occupation, Mr. Danziger?

A. I am a lawyer. I haven't been practicing for some years though.

Q. When were you admitted to the bar?

A. Something over 40 years ago.

Q. In the state of California?

A. Yes, sir.

Q. And you were admitted to the bar of the United States District Court for this district, I take it? A. Yes, sir.

Q. About when?

A. About 40 years ago. [101]

Q. And you have remained a member of the bar of this court during that 40-year period's time?

A. I have, sir.

Q. You have been active with Mr. Rose in the management of your defense in this case—by "this case" I mean the one that was tried before Judge McColloch?

A. I was active in preparing the case and getting evidence together and informing him of what the case was all about and I think running down some of the authorities.

Q. When the case was called for trial in Judge McColloch's court, you understood and knew at that time, did you not, that any person charged with

(Testimony of Jacob Morris Danziger.)

crime was entitled to be tried by a jury?

A. Yes, I knew that general principle of law. I have known it for many, many years.

Q. And you knew that there was a jury available to try your case if you desired a jury trial?

A. Well, I am sure there would have been had I so requested.

Q. Now Judge McColloch didn't ask you to waive trial by jury, did he? A. No.

Q. The United States Attorney didn't ask you to waive trial by jury?

A. He didn't. Nobody asked me to do anything. Mr. [102] Rose as my attorney may have construed some of the language that was used at the time in that direction. I don't know. I didn't take it into account.

Q. So far as you were concerned, the waiver of trial by jury was a matter of judgment on your part and that of your counsel, wasn't it?

A. It was. I recognized that I had the final say on the matter, and of course I consulted with Mr. Rose on the general subject.

The Court: It was your best judgment at the time that you should waive trial by jury?

The Witness: Not up to the time that the court made—not prior to the time the court made its remarks that day. When I did waive it was my judgment, based upon consultation with my counsel, that the waiver should be made.

The Court: And you based that upon the propo-

(Testimony of Jacob Morris Danziger.)

sition, if I understand you correctly, that you understood that if you had a jury trial and had to seek a continuance for the purpose of getting witnesses it would not be likely to be granted?

The Witness: No. My thought was that the court, if we had a jury, would not be very apt to grant a continuance.

The Court: That is what I asked.

The Witness: Because it was something he couldn't do. He couldn't grant a continuance that would run for a great [103] many months. The affidavits that I suggested that I wanted to get, or the depositions, were in London and in various other places, that we were at war at that time, and I felt that the court wouldn't be apt to grant a continuance if it came to a point that we had a jury.

The Court: Very well. Any other questions?

Mr. Tolin: Yes.

Q. Mr. Danziger, you never thereafter made or heard made on your behalf any motion for a continuance for the purpose of taking depositions, did you?

A. I have no recollection of it unless some of the remarks that Mr. Rose made to the court in the argument might possibly be construed as a request. I do remember that I got out the testimony myself where Mr. Rose on two or three occasions deplored the dilemma that we were in because we were not able to take the depositions. Now I don't want to

(Testimony of Jacob Morris Danziger.)

sit here and say that that was or was not a request to the court, Mr. Tolin.

Q. So far as you know you don't recall that there was any request of the court made?

A. Unless those remarks can be construed to be such. I have no recollection of anything other than that.

Q. Now, Mr. Danziger, when you were arrested in this matter, that was within a few days after the date the indictment was returned into court?

A. That is correct.

Q. Did you appear before Commissioner Head in connection with the posting of your bail?

A. Not at all. The bail was fixed on the indictment and the arresting officer came with a warrant, not the indictment; he came with a warrant and I went with him to the marshal's office and the marshal permitted me to telephone, and I telephoned to some friends, and before that day was over a bond was posted. I never was before any commissioner. I have never seen Mr. Head in my lifetime. I wouldn't know who he was. And nothing happened except that.

Q. At about that time you went into the Clerk's office and read the indictment?

A. On my way from the——

Mr. Rose: Just a minute, your Honor. I submit that that isn't a proper inquiry. I didn't go into that subject at all.

The Court: Overruled. You did read the indictment that day?

(Testimony of Jacob Morris Danziger.)

The Witness: No, I didn't read it. I never read it until we were in Judge McColloch's court. I scanned it. I got a copy of the indictment. I went to the Clerk's office and asked for it and it was given to me.

Q. (By Mr. Tolin): That was on the day you made bail? A. Yes. [105]

Mr. Tolin: That is all.

The Court: Is that all?

Mr. Rose: Just one further question.

Redirect Examination

By Mr. Rose:

Q. Some inquiry has been made by government counsel respecting your activity as a lawyer. Have you ever handled any criminal proceedings?

A. Never in my lifetime have I ever handled a criminal case.

Mr. Rose: That is all.

The Court: Step down.

(Witness excused.)

The Court: Have you finished?

Mr. Rose: Yes.

The Court: Mr. Tolin, it looks like your time has arrived. You say you want 10 minutes?

Mr. Tolin: I said 15 but possibly I can get through in 10.

The Court: We will go ahead, or do you want a recess at this time?

Mr. Tolin: Perhaps if we took one now I would have an opportunity to collect my thoughts.

The Court: Very well. We will have a short recess.

(Short recess.) [106]

The Court: Mr. Tolin?

Mr. Tolin: May it please the court, there has been a great deal said here about the likelihood that the Appellate Court did not consider that point which I think is the only question presented here today, that one about the absence of women on the grand jury.

I recall the day that this case was argued on its merits in the Circuit Court. I had quite a bad day of it because, as Mr. Rose has pointed out, my brief was stricken and I was told to write another one. But as we were waiting for the court to convene Mr. O'Brien came into the courtroom and he said, "This will interest you gentlemen," and he handed us a copy of the opinion in Bell v. United States. It was still in typewritten form. It was going to the printers. The court had just decided it that morning.

The Court: That was the Circuit Court?

Mr. Tolin: Yes. And it said, upon the authority of Ballard v. United States the court reverses the judgment and sends it back to the trial court for dismissal. In substance that is what it said. I think that was perhaps the first time that anyone connected with the Danziger defense had any idea of dissatisfaction with the complexion of that grand jury.

The Court: The Ballard case was decided after

the opinion in this case. The Ballard case was decided by the Supreme Court. This case was decided July 8, 1947, and the Ballard [107] case was decided December 9, 1946. When was this case argued?

Mr. Tolin: It was argued about a month before the decision.

The Court: The rehearing was denied July 8th. It does not give the date of the decision. That is the date of the rehearing. It was argued in the Circuit Court of Appeals before the decision in the Ballard case, was it not?

Mr. Tolin: It was argued after the decision of the Ballard case and following the decision of the Ballard case by just a few days the Circuit Court then decided the Bell case and we were then up there the day the Bell case was decided. We were before the Circuit Court for argument on that day. I think it was the occasion perhaps of the second argument. We were there and argued it twice.

The Court: That was on the rehearing?

Mr. Tolin: No, we argued it twice on the main appeal, but that court then was exceedingly Ballard case conscious, it was exceedingly grand jury complexion conscious, and we all became that way, too. Mr. Rose filed his petition for rehearing and followed it up within a very short time with a supplement to it which was accepted and then immediately after the court received that supplement to the petition for rehearing I received a memorandum from the court to file a reply thereto.

Well, the petition for rehearing as originally drafted [108] was merely a rehash of the matters which had been argued on the case in chief, and I took it we were urged to file a reply to the petition for rehearing, which Mr. Carter told me had not happened within the history of the United States Attorney's office as long as he had been connected with it. Sometimes on our own motion we would file a reply, but the court had never asked for one. I took it that they were interested in the question that Mr. Rose had propounded, namely, that there were no women on the grand jury. So we set about and briefed that particular question and sent it up, whereupon the court denied the petition for rehearing.

It occurs to me that a lot has been said about this being a constitutional question, and that perhaps it isn't a constitutional question after all. The Ballard decision refers to the statute which prescribes that juries, grand juries, in the District Courts shall be impaneled from persons having the same qualifications to serve as jurors in the courts of the state, and it was briefed in the Ballard case, that women were eligible to serve as jurors in the state of California and had been for 28 years prior to the impanelment of the particular grand jury which indicted Mrs. Ballard, and that the studious or systematic exclusion of women from the grand jury of this court was not in compliance with that statutory requirement.

The Court: There are a number of things that

are wanting in both the Ballard case and the Theil case for the sake of [109] clarity.

Mr. Tolin: Yes.

The Court: I have studied them many times, and while the court said in the Ballard case that they were reversing it by virtue of their power and supervision over the lower courts, which would indicate that they thought an injustice had been done in that case and they were going to supervise it by sending it back, and while it is true that they refer to the statute, still they base their decision on the fact that there had been a systematic exclusion of women.

Mr. Tolin: Which violated the statute.

The Court: Which violated the constitutional right, according to the previous decisions of the Supreme Court. I refer particularly to the White case and several cases arising in Texas, as well as the Virginia case, where they raised the question that the states had violated the Fourteenth Amendment because they had systematically excluded Negroes.

So it seems to me that that was the basic constitutional right. I do not know what else they were basing it on. They refer to statutory rules, but they do not refer to any statute at all or any rule of court or anything else about the method of selecting juries and grand juries.

Mr. Tolin: Sometimes it is unfortunate, from the standpoint of trial courts like yours, and trial attorneys like those in our office, to find that courts of appeal are so [110] careful to not express them-

selves any more than they have to to decide the particular case. If they would give us a little more advice on these things we perhaps wouldn't have these long hearings, and matters would not be so in doubt. However, we have to take things as they are given to us.

The Court: Yes.

Mr. Tolin: The cases to which Mr. Rose has referred, and indeed this case of Musser v. Utah to which your Honor referred yesterday, comment upon broad terms. For instance, in Musser v. Utah a preliminary motion to quash the information was stated in broad terms which it is claimed admitted of argument of any Federal grounds. And they go on in all these cases to talk about the broad terms of cases which were laid.

The Court: His written motion was not broad but his oral statement was certainly broad.

Mr. Tolin: His written motion didn't go to this subject at all, it went only to the matter of no arraignment.

The Court: That is right. But his oral argument and his oral motions state that he moved to quash the indictment on the ground that it was contrary to the laws of the United States.

Mr. Tolin: Well, your Honor, I wonder if it is broad or if it is just lengthy. I think it is not so broad. May I read it?

The Court: I have read it a dozen times. [111]

Mr. Tolin: Well, your Honor will recall that it starts out—just referring to it then without reading it all—by a comment on the testimony of Mr.

Maitland and Miss Skinner, and that those people had told how they testified before the grand jury and that it was apparent to Mr. Rose that if the grand jury indictment was obtained upon testimony of that sort it was obtained upon hearsay testimony.

Then he goes on to say that he hadn't been apprised of that and so furthermore he wasn't in position to interpose any dilatory pleas, that in the normal course of events had this case progressed along usual lines I submit, your Honor, I would have made a motion to quash the indictment on the ground that it was procured illegally, contrary to the laws of the United States, and it was procured purely on hearsay and on insufficient evidence to warrant and support the indictment.

I suppose the judge hearing that would take it that the language, "that it was procured illegally and contrary to the laws of the United States," followed immediately by a particularization that it had been obtained upon hearsay and unsubstantial evidence, would mean that it was that particular matter rather than any other.

The Court: I think so.

Mr. Tolin: So you see it is not a motion which is in broad terms. He doesn't just come in and say the Fourteenth [112] Amendment is violated, the Sixth Amendment, or any particular amendment, or any particular constitutional right which the defendant had. He refers to those things and then he immediately ties to it this very specific and narrow charge.

Then he goes on to say the part that he has quoted in his memorandum on this habeas corpus proceeding:

"For that reason (tying back to what I just read) now that these facts appear evident at the conclusion of the government's case, I addressed to your Honor a motion to quash the indictment upon the grounds that the same was procured contrary to the laws of the United States in violation of the constitutional proviso, namely, due process, the equal protections of the law and the statutes in cases concerning the subject of the requisite evidence and character of evidence essentially required in order to vote an indictment against an accused and put him to trial."

Now I don't feel that we can say here now that Mr. Rose addressed any broad motion upon constitutional grounds generally. He instead attempted to address a specific grievance that he had about the hearsay testimony of Maitland and Skinner, as he considered it to be, to those particular constitutional provisions and to hang it onto that. That is all that you can get out of this 3-page motion and comment, and [113] that is all that Mr. Rose could get out of it when he came to drawing his specifications and grounds on appeal.

As I pointed out in our memorandum, I got those out and read them and he says, referring to that point, that the indictment has been procured solely on hearsay evidence as reflected by the record, and citing back to this motion. And in his specification 8, on the grounds of appeal, he says that the court

erred in refusing to grant the defendant's motion to quash the indictment on the grounds that the same was procured solely on hearsay and incompetent evidence.

So whenever he who drew this—he didn't draw it—who made orally this motion to quash had occasion to interpret it when he was asking the higher court to review the lower court's decision on it, and he didn't breathe into it what he breathes into it today, that it was a broad attack.

The Court: I see your point. [114]

* * *

The Court: I gave consideration to the case of Musser v. Utah and the Supreme Court's statement in there about some whisper of a suggestion made in the lower court was actually raising a point.

Mr. Rose: I know that, your Honor. In fact, you called my attention to that case. It had just come down and I didn't even know of its existence. Your Honor knows I don't beat around the bush. I didn't know about it.

The Court: I could not find that in the record here.

Mr. Rose: Well, your Honor, if you will consider the scope of my objection, I said that the grand jury was an illegal body, I said that this indictment had been procured contrary to the statutes and the laws of the United States and the Constitution and everything else.

The Court: Not that the indictment had been procured. I think what you were complaining about

then—I set it up in my memorandum, your specific statement. [129]

Mr. Rose: I am quite sure that I used the word "indictment."

The Court: You say: "I address to your Honor a motion to quash the indictment on the grounds that the same is procured contrary to the laws of the United States in violation of the constitutional provisos, namely, due process, the equal protection of the law and the statute in cases concerning the subject of requisite evidence and character evidence ——"

Mr. Rose: "And." Note the "and."

The Court: Had you stopped at "the equal protection of the laws and the statute in cases," if you had stopped there maybe under the case of Musser v. Utah the Supreme Court might have held, or I would be justified in holding, that you had raised every possible and conceivable charge. But you did not.

Mr. Rose: I will agree with the court if that "and" wasn't there.

The Court: You said "those constitutional provisions and statutes relating to the evidence and the character of the evidence."

Mr. Rose: I said "and." In other words, your Honor will have to concede that when I make an objection I make it broad enough. I have "and" there.

The Court: "Concerning the requisite evidence and character [130] of evidence."

Mr. Rose: I say "and."

The Court: You were aiming your objection at the nature of the evidence.

Mr. Rose: No, your Honor. If you choose to, and apparently you have—and I am not saying this critically—you can argue that. I mean, you can deduce that deduction from it. But the point is, in the light of the policy of the Supreme Court of the United States in the Musser case, where they say the slightest suggestion was sufficient for them to take hold of the issue, in the light of that policy your Honor will have to admit that I have an argument there of some kind. Certainly in the light of Mr. Justice Denman's views as I just indicated, where he goes so far as to say that even the court shouldn't have taken the plea of guilty to this man having been indicted by that type of jury, that he should have advised him of his right to dismiss.

Now, then, these are pronouncements that have been made since, your Honor, this case was argued.

The Court: I gave consideration to that fact too, and discussed the matter.

Mr. Rose: Now your Honor's view in a sense I can appreciate, you are sitting here as a trial court and you state—and I will have to respect that as a proper judicial attitude—you take the position that if there is any merit [131] to this thing the Circuit or some higher court, some Circuit having entertained this appeal, should entertain these contentions.

The Court: No, I do not take that position. My position is that I have decided the law as I see it.

Mr. Rose: Very well. [132]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of January, A.D., 1948.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed Feb. 1, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The above-named petitioner, Jacob Morris Danziger, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decision and judgment discharging the writ issued in the above-entitled proceedings, and in which matter findings of fact and conclusions of law were filed on the 9th day of July, 1948, and judgment was

entered as reflected in Book No. 51 at page 726 of the records of the above-entitled Court.

/s/ JACOB MORRIS DANZIGER,
Petitioner,

/s/ A. BRIGHAM ROSE,
Attorney for Petitioner.

Service acknowledged July 14, 1948.

[Endorsed]: Filed July 14, 1948.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 51, inclusive, contain the original Petition and Order for Writ of Habeas Corpus; Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Traverse to Return to Writ of Habeas Corpus; Memorandum Opinion and Order; Findings of Fact and Conclusions of Law; Order Discharging Writ of Habeas Corpus and Remanding Petitioner to Custody; Notice of Appeal; Statement of Points to be Relied Upon on Appeal; Designation of Contents of Record on Appeal and Order Extending Time for Docketing Appeal, which, together with original reporter's transcript of proceedings on February 2, March 1 and 2 and July 26 and 27, 1948, and copy of Transcript of Record in Four Volumes in the United States Circuit Court of Appeals for the Ninth Circuit entitled Jacob Morris

Danziger et al vs. United States of America, No. 10989 and Supplemental Transcript of Record in the Supreme Court of the United States entitled Jacob Morris Danziger vs. United States of America on Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 17th day of February, A.D., 1949.

EDMUND L. SMITH,
Clerk,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12189. United States Court of Appeals for the Ninth Circuit. Jacob Morris Danziger, Appellant, vs. Robert E. Clark, United States Marshal, Southern District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 18, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12,189

In the Matter of:

THE PETITION OF JACOB MORRIS DANZIGER for a Writ of Habeas Corpus in Proceedings herein numbered 12,189 entitled "Danziger vs. Clark," etc.

STATEMENT OF POINTS ON WHICH PETITIONER AND APPELLANT, JACOB MORRIS DANZIGER, INTENDS TO RELY, AND DESIGNATION OF RECORD.

To Paul P. O'Brien, Clerk of the above entitled court, and to James M. Carter, United States Attorney for the Southern District of California, Central Division:

Please Take Notice that the above named petitioner and appellant, Jacob Morris Danziger, on his appeal in this cause, intends to rely upon the following points, to-wit:

I.

That the law requires that the judge hearing an application for a writ of habeas corpus must for himself determine whether there was a denial of due process in violation of the constitutional rights guaranteed to an accused.

II.

That it was the duty of the judge in the District Court to examine the entire record to determine

whether there was any evidence in the record to sustain the conviction regardless of the opinion of the Court of Appeals.

III.

That the judge of the District Court erroneously invoked the doctrine of res adjudicata.

IV.

That it was the duty of the judge hearing the matters on habeas corpus herein to decide for himself whether the petitioner had been validly indicted, and to determine the distinction between waiver of a speedy trial and waiver of arraignment, the latter claimed by petitioner to be jurisdictionally requisite.

V.

It was error of the judge in the District Court to disregard the undisputed evidence that in the opinion rendered by the Court of Appeals in the case of United States vs. J. M. Danziger, No. 10,989, the Court in its decision was not considering the true affidavit established of record for a continuance.

VI.

It was error for the District Court to assume that the petitioner was barred from establishing his denial of due process and to have his contentions heard respecting his deprivation of his constitutional rights in the hearing on habeas corpus, on the assumption that the manifest declaration in the Court of Appeals opinion was to the effect that

they had considered all other points and that they had no merit. See the issues raised in the petition for the writ, the traverse to the return, and opinion of Judge Peirson Hall filed March 18, 1948.

VII.

It was error for the District Court to adopt the restricted and super-technical theory that petitioner's motion to quash the indictment would have been well grounded if his counsel had stopped at a particular point in his objection and not added thereto.

VIII.

The District Court erred in considering the attack on the original trial judge's demeanor in the manner in which he tried the case, as expressed by his views reflected in the transcript filed on March 4, 1945, wherein at a hearing not attended by petitioner or his counsel said trial judge confessed that he had proceeded to try the case on the theory that the defendant had virtually pleaded guilty.

IX.

It is the contention of petitioner that the District Court was obliged to consider the habeas corpus proceeding in the light that the validity of conviction for crime is not restricted to those cases where the judgment was void for want of jurisdiction; that such proceedings embrace a consideration of the issue as to whether the conviction has been procured in disregard of the constitutional rights of the accused.

X.

The District Court erred in its failure to recognize that an attack on jurisdiction can be raised at any time.

XI.

The District Court erred in failing to recognize that where the indictment and proceedings are invalid, and where it appears that the defendant had been denied due process of law, it was the duty of the District Court to determine this contention on the record and the facts presented, as distinguished from assuming that the Court of Appeals decision and denial of certiorari in the United States Supreme Court were binding and conclusive and, therefore, barred an inquest in the validity of the proceedings.

XII.

The District Court erred in failing to find that petitioner herein had in his original case been coerced into waiving a trial by jury because of the unusual circumstances that were acknowledged to exist by the trial judge at the time of the commencement of the trial.

XIII.

The District Court erred in failing to make Findings.

DESIGNATION OF RECORD

You, and Each of You, Will Further Take Notice, that the petitioner and appellant, Jacob Morris Danziger, designates the parts of the record which he believes necessary to a consideration of the aforementioned Points on which he intends to rely on appeal, as follows:

(1) The application for the writ of habeas corpus, dated December 1, 1947.

(2) The order granting the writ, dated December 1, 1947.

(3) The return to the writ dated January 1, 1948.

(4) The traverse to the return, dated January 12, 1948.

(5) The remarks of the Honorable Claude McCulloch made at the hearing held March 4, 1945, and filed in this cause.

(6) The opinion of Judge Peirson M. Hall filed March 18, 1948.

(7) The order discharging the writ of habeas corpus.

(8) That portion of the certified typewritten transcript of the official court reporter, as follows:

Page 2, line 11, to page 10, line 11;

Page 12, line 10, to page 13, line 20;

Page 17, line 10, to page 18, line 6;

Page 23, line 2, to page 54, line 9;

Page 58, line 3, to line 16;

Page 60, line 11, to line 20;

Page 60, line 23, to page 67, line 13;

Page 72, line 1, to page 92, line 25;

Page 98, line 2, to page 114, line 16;

Page 129, line 9, to page 132, line 6.

Notice of Appeal and Clerk's Certificate.

(9) The petitioner designates that the official record which was originally received by the Court of Appeals and presented to the Court at the occasion of the hearing of the habeas corpus proceeding be referred to.

It should here be noted that the Court of Appeals originally granted petitioner permission to refer to the original exhibits received at the time of trial and did not require the same to be made a part of the printed record.

/s/ A. BRIGHAM ROSE,
Attorney for Petitioner and
Appellant.

Affidavit of Service by mail attached.

[Endorsed]: Filed June 13, 1949.